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1 Rec. Feb. 12, 1881

may 14
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C
TREATISE
ON THE
ACTION
OF
EJECTMENT.

BY CHARLES RUNNINGTON, J.C.

EDITOR of the last Edition of

HALE'S HISTORY OF THE COMMON LAW.

LONDON:

Printed by W. STRAHAN and M. WOODFALL, Law-
Printers to the KING's most Excellent MAJESTY.

For WHEILDON and WALLER, Fleet-street.

M. DCC. LXXXI.

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In Horrocks's Bibliotheca Le-
gum, I find a mention of "The
Law and Practice of Eject-
ments. By Chief Baron Gil-
bert. To which are added the
last Process and of Pleas the
final verdicts, judgments, ex-
ecutions, and Proceedings in
Error, by J. M. 1734. 2d
ed. 1741. The same. The
last being a new edition.
And in the preface to his edition
of Gilbert's Law of Ejectments
the same work is mentioned
and a second edition with
additions by Charles Bur-
rington, Esq. now and to have
been published in 1791.
Which no doubt is the only
work. In 1795 Mr. Burrington
published another edition,
much enlarged & aspiring to
originality of authorship.

William Green. 1837.

A present from

Daniel F. Slaghter.

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PREFACE.

THE late chief baron Gilbert, whose writings intitle him to an eminent rank in the classes of learning, employed some time in composing "a Treatise on the Law and Practice of Ejectments." Though he had completed the tract long before his loss was deplored, yet it did not make its appearance in the world, till some time after his decease. Hence, however, its authenticity has been questioned; happily it has been questioned only by those who were incompetent to decide upon its merits; and who, strange as it may seem, have not only taken from it by the page, but cited it, in many instances, as decisive. The profession will not, I trust, suffer the name of Gilbert to be lessened, by the

A.4 confidence

P R E F A C E

confidence of anonymous compilers. In truth, the tract, as originally published, affords so many instances of penetration and accuracy, that the intelligent reader cannot but persuade himself that *Gilbert* was its author—a man enlightened by reflection, and dextrous, by long practice, in the use of books.

THIS tract, the utility of which cannot be denied, having been long out of print, * I thought proper to make it the foundation of the present publication. My ambition is only to give the name of *Gilbert* new lustre, and greater popularity. It is not however on the praise of others, but on his own writings that he is to depend for the esteem of posterity; of which he will not easily be deprived, while learning shall have any reverence among the professors of the law. The present treatise claims no other merit, than a different and more enlarged

* The last edition was published in 1742.
disposition;

P R E F A C E

disposition;—a disposition which was rendered necessary, from the very material alterations, which the wisdom of the legislature, and the liberality of modern decisions, have made in the action of Ejectment. It contains indeed (among other considerable additions) a system of modern practice, for the uniformity of which I will not however take upon myself to answer: for in the *practice* of the law, it seems to be unknown that there is, in constancy and stability, a general and lasting advantage, which will always over-balance the slow improvement of gradual correction.

WITH what judgment it has been formed, and with what skill it has been executed, the profession is now to determine.—I hope for the praise of knowledge and discernment, but can claim only that of diligence and candour.—That it will be found capable of amendment; that some things may be added, and others may be altered, I have not the vanity to doubt.—Let it however
be

P R E F A C E

be remembered, that, (to use the language of Bacon), "I hold every man a debtor to his profession;"—and that those who make no advances towards excellence, may stand as warnings against faults.

Pump Court, Temple,
Nov. 1, 1780.

I see in Wort. Biblioth. Leg. ed. 1763 p. 120 another work mentioned, of a date prior to Lord Chief Baron Gilbert's under the title "Law of Ejections," shewing the nature of Ejections; the difference between a writ of Ejectment and how to be brought, &c. moved where the land lies in franchises; of what things Ejectiones firmæ lie; &c. also who are good witnesses or not in a trial of Ejectment; with the learning of verdicts as large. **CONTENTS** Printed in 1700. from the edition with the addition of late rules of practice & a digest of cases 1713. Lord Chief Baron Gilbert's work was first published in 1734 after his death. On

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 on which, J. C. brother of E. C. the youn-
 ger, was admitted, and surrendered, by let-
 ter

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That the premisses are copyhold, and held under this custom, that, upon a surrender, the party, having a right, shall be thrice proclaimed to come in; and that on default, the premisses shall be seised to the use of the lord. That H. W. and his wife were seised for

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for life, remainder to I. B. in fee; that they jointly surrendered out of court to the use of R. F. and his heirs; but before any court R. F. died, his heir being within age.

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A TREATISE

A
T R E A T I S E
O N
E J E C T M E N T.

AN ejectment is a mixed action, by which a lessee for years, when ousted, may recover his term, and damages: it is real in respect of the lands, Comb. 250. but personal in respect of the damages.

Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. In this treatise, therefore, the following points are meant to be investigated.

I. *The history of the action.*

H. *For whom, and in what cases, it lies; and herein, of the lessor's right of entry.*

B

III

III. *For what things it will lie; and how they are to be described.*

IV. *The writ and process.*

V. *The antient practice; and in what cases, it is still to be adhered to.*

VI. *The modern practice; and herein, of the declaration.*

VII. *The plea and general issue.*

VIII. *The verdict, evidence, and new trial.*

IX. *The judgment and it's incidents; and herein, of the costs.*

X. *The writ of error.*

XI. *The execution.*

XII. *The action for mesne profits.*

I. *The history of the action.*

Here it is to be considered, that, by the antient common law, lands and tenements were never recovered in any personal action; the writs of entry and assize being the usual means, for recovery of the possession. These however lay only against the *freeholder*; because the estate for years was, heretofore, only a precarious possession: and
to

EJECTMENT.

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to have actions against such persons was to no purpose, such terms being generally defeated or determined, before any intricate title could be decided. Besides, these possessions being so very precarious, the possessors were not intrusted with the defence of the interest of the land; and therefore, if they were ousted by *strangers*, they could only have recovered damages for the loss of their possessions; and if they were ousted by their *lessors*, they could only seek a remedy from their covenants.

[Blac. Com. 3
v. 156, 200.]

But it was thought reasonable that they should have this remedy against their lessors; for, during the term, they were bound to make good the rent, and if they did not, the law allowed the lessor an action for withholding it. And as this construction was made, for him, upon the words *yielding and paying*, which in themselves were no express covenant, it was but reasonable that the like construction should be made for the possessor, upon the word *dimisit*; especially as, by making this construction, equal justice was done to both parties.

Thus the law continued till the 14 H. 7. when it began to be resolved that an *habere facias possessionem* would lie to recover the *term* itself. It seems that about this time long terms had their beginning;

F. N. B. 220.
[3 Wils. 120.]

B 2

and

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and that since lessees for years could not by law recover the land itself, they used, when molested, to go into equity against the lessors for a *specifick performance*; and against strangers, for *perpetual injunctions*, to quiet their possessions. This, drawing the business into the courts of *equity*, induced the courts of *law* to resolve, that they should recover the land itself by an *habere facias possessionem*.

[It however is a question, which has been much agitated, whether the term was recoverable in ejectment, prior to the reign of Hen. vii. The authorities, on either side, are so numerous and respectable, that it might be deemed impertinent, to obtrude an opinion, on the subject. Suffice it to remark, that the late learned commentator thought that the method of recovering the term, in ejectment, was settled as early as the reign of Edward iv: and in support of this opinion has adduced an authority, precisely in point*. To this may be added, that the ejectment was NEVER laid

Black. Com.
3 V. 201.

Post. but see
3 Will, 120.

* 7 Edw. iv. 6. Per Fairfax; si homo per ejectionem firmam, le Plaintiff recouvrera son terme qui est arreue, si bien come in quare ejetit infra terminum; et, si nul soit arreue, donques tout in Damages. (Bro. Abr. tit. quare ejetit infra terminum, 6.)

with

EJECTMENT.

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with a *continuando*; consequently, the plaintiff in such action, could NEVER recover damages for the mesne profits. Hence it may be inferred, that the term was recoverable in ejectment, even prior to the reign of Hen. vii.; for else, the plaintiff not recovering damages, the action must have been nugatory.

By this means was introduced a new method of trial unknown before to the common law; for now it became usual for a man who had a right of entry into lands, to seal leases of ejectment thereon, and then the person who next entered on the freehold was an ejector.

The convenience which arose from this method was, that they could try the title *toties quoties*; whereas if the plaintiff was barred, in an *assize*, he was put to his *writ* 6 Co. 7. b.

of right. This liberty being however 10 Mod. 1. abused, applications were frequently made to the court of chancery, after three or four ejectments, to establish the prevailing party's title, by a bill of peace; yet that court has always denied to interpose, because every termor may have an ejectment, and every new ejectment supposes a new demise; and the costs in ejectment are a recompence for the trouble and expence to which the possessor is put. But where

the suit begins in chancery for relief, touching pretended incumbrances on the title of lands, and that court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, they have ordered a perpetual injunction against the defendant; because the suit was first attached in that court, and never began at law: and such precedent incumbrances appearing to be fraudulent and inequitable against the possessor, it is within the power of the court to relieve against them.

But the method of proceeding at law, against a casual ejector, was a mean of turning any man out of possession; because such plaintiff could recover his term without any notice to the tenant in possession. The courts of justice therefore, would not suffer that men should lose their possessions without any opportunity to defend them; to effect which purpose, they made it a standing rule, that no plaintiff should proceed in ejectment, to recover his lands, against such a casual and titular ejector, without delivering a declaration to the tenant in possession, and making him an ejector and proper defendant, if he pleased.

F. N. B. 489.

This was a proper rule, and in the power of the court to form; for otherwise the court would

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would have been made instrumental in doing an injury to a third person. A declaration might otherwise have been delivered to a stranger, a feint defence made, and a verdict judgment and execution obtained, without the tenant's having any notice of it. And though it is not to be doubted, but that such actions were brought at first against the real ejectors who resided in the possession, yet because any person who came upon the land, *animo possidendi*, was equally an ejector with him who resided there, the action in strictness of law might have been brought against him, but because this, as has been said, turned to the injury of the residing possessor, the rule was made, that he should have notice of it; and therefore the courts would not give judgment in ejectment, unless an affidavit was made, that the tenant in possession was served with a copy of the declaration.

The antient practice was, that leases of ejectment, to try the title, should be actually sealed and delivered; because otherwise the plaintiff could maintain no title to the term; and they were also to be sealed on the land itself, it being maintenance to convey out of possession. Therefore, though in relation to the quickness

A TREATISE ON

of the remedy, the *affize* had the advantage; because in that action none of this preparation was required beforehand; for the writ of *affize* came down to the assizes, the jury was there warned, the cause tryed, and judgment given. Yet the method of proceeding in ejectment, from the convenience of repeated trials, notwithstanding the previous preparation, was generally preferred.

Thus stood the law till the time of lord chief justice Rolle, who invented the rule now in use; which is, that if the defendant appears in the room of the casual ejector, he shall enter into a rule to confess *lease, entry, and ouster*, and insist upon the *title* only. This rule was highly reasonable, because, when the plaintiff had made his lease upon the land, any third person who came thereon, *animo possidenar*, was in strictness of law an ejector; and therefore when any other ejector was placed in his stead, it was but reasonable that the court should impose terms upon him; and the proper terms were, that he should not stand on the proof of an *actual entry, demise* and *ouster*, these being no more than forms to bring the title in question: and it was not fit that the plaintiff should be nonsuited for want of proving the formal demise set forth in the declaration,

EJECTMENT.

declaration, when the casual ejector would have let the judgment go by default.

II. *For whom, and in what cases, an ejectment lies; and herein of the lessor's right of entry.*

Although, by the modern practice, the defendant is obliged, by rule of court, to confess lease, entry, and ouster, yet that rule was only designed to expedite the trial of the plaintiff's right, and not to give him a right which he had not before. Hence, it must appear that the plaintiff had actually the possession, and was ousted thereof by the defendant; for the ejectment is an action of *wresspass* in its nature, and is said to be done *vi et armis*, and therefore it must be done to the person himself complaining, and not to another person who had the plaintiff's possession, though the plaintiff's title be affected by such ouster. For it were an impropriety to say, that the defendant *vi et armis* ejected the plaintiff, when it appears, by the plaintiff's own shewing, that he had not the actual possession; but that it was at the time of the ouster in another. Therefore, if A. lessee for years, make a lease to B. at will, and B is ejected, A. cannot have this action upon that ouster, because though the possession of B was in law the

1 Rol. Rep. 3.

the possession of A. yet the trespass *vi et armis*, which is complained of in this action, must be against the actual possession; and that was in B. But it seems in this case, that B. though but tenant at will, may make a lease to punish the trespass and ejectment; otherwise there would be an injury done, and no one allowed to punish it.

Ibid,

So if A. be lessee for years, remainder to B for years, and A is ejected, and then his term expires, B. shall not have an ejectment on the ouster of A; because the possession was not actually in him, and he cannot complain of a trespass done to another.

T. Raym.
463.

So if the heir bring an ejectment, and pending the suit his ancestor dies, yet he shall not recover; because every man must recover, according to the right he had at the time of the action brought: and, during the life of the ancestor, the ejectment was done to him only, and therefore he alone must punish the injury. For one man cannot complain, in a court of justice, of an injury done to another.

2. Co. Lit. 42.

Co. Lit. 42.

But the conusee of a *statute merchant*, or *statute staple*, and tenant by *elegit*, may maintain an ejectment; for though these tenants have but a chattel-interest, and that for a period of uncertain duration, *viz.* till their

EJECTMENT.

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their debts are satisfied, yet this being a permanent interest, the law has provided for it's security, by this action.

So an executor may have this action, for an ejectment done to the testator. For though at the *common law* it was held, that personal wrongs died with the person, yet when the *statute* gave the action for goods taken out of the possession of the testator, it seemed but an equitable construction of that act, to extend the remedy to terms for years, and to punish the trespass on that sort of property; especially as leases for years were looked upon as goods and chattels. It was the more reasonable to bring them all under the same regulation.

1 Vent. 30.

7 H 4, 6. b.

4 Ed. 3. c. 6.

[An ejectment being a possessory remedy, the lessor of the plaintiff must have a right of entry, when this action is brought; for if his entry be taken away, he cannot legally enter to make a lease, to try the title; and he cannot be allowed to prosecute his right by an unlawful act. The old method of proceeding in ejectment required an actual entry, and the modern practice supposes it; and though that practice obliges the defendant to confess *lease entry and ouster*, for the ease of the parties, and for the expedition of the trial, yet this hath made no alteration in the law, nor was ever intended to better the plaintiff's

1 Burr. 119.

plaintiff's title, or to give him a new right of entry. For that were; by a rule of court, to oblige the defendant to admit a better title in the plaintiff than he really hath, which would be an act of injustice in the court. Therefore, where tenant in tail makes a discontinuance, the issue in tail is put to his *formedon*, and cannot have an ejectment; because his entry, by the discontinuance, is taken away. 1

By the common law, the alienation of an husband, who was seized in the right of his wife, worked a discontinuance of the wife's estate. But now, by the 32 *Hen. VIII. c. 28.* it is provided "that no act of the husband only, shall work a discontinuance of, or prejudice, the inheritance or freehold of the wife; but that, after his death, she or her heirs may enter on the lands in question".

Another way of tolling, or taking away, the right of entry is by DESCENT; for the law presumes that the possession, which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be shewn; and therefore the mere entry of him who has right, is not allowed to evict the heir. But by 32 *H. 8. c. 33.* "If a *Disseisor* die within five years after the *disseisin* done, and

“ and the lands descend to his heir, such descent shall not take away the entry of the disseisee, though he has made no claim”. But if there be five years quiet possession in the disseisor, continual claim is still as necessary as it was before the statute.

Abaters and intruders are not within the statute of 32 H. 8. for that statute being penal, was only extended to cases where there was an actual ouster of the tenant, which is a consequence of all disseisins, be they done with or without violence: an abater or intruder ousteth no one, and therefore they remain as at common law. But disseisors and their heirs are within the express meaning and intent of the statute, which gives the remedy to the disseisee; and though the preamble of the statute only speaks of ‘*disseisins with force*,’ and the body of the statute of ‘*such disseisins*,’ yet was it extended to all disseisins, as being within the same mischief.

Co. Lit. 238.
Plowd. 47.

11 Co. 33.
13 Co. 6.
Dy. 219.

The feoffee of the disseisor is not within the statute, because he has not ousted any one; and therefore if such feoffee die, and the land descend to his heir, this descent will take away the entry of the disseisee or his heirs.

Co. Lit. 238.
2.

But bodies politic and corporate, so you hold yourself to a disseisin, are within the remedy of the statute.

Co. Lit. 238.
2.

Ibid.

Plowd. 47.

If there be tenant for life, the reversion in fee, and the tenant for life is disseized and dies, and the disseisor afterwards dies within five years, the reversioner is within the benefit of the statute, and his entry is not taken away; for after the death of tenant for life, it is a continuation of the same disseisin to the reversioner. But if the disseisor had died seized, and the tenant for life had died, there the descent would have taken away the entry of the reversioner; because there was no continuation of the same disseisin upon the reversioner. The act only continues a right of entry in the disseisee, where a right of entry was once in him; but in the last case, there was no right of entry in the reversioner, nor could he have an *affize*, or *writ* of entry in the first degree: and never having had the right of possession, he is not a disseisee within the statute, to punish this as an actual ouster; since it was no actual ouster of the reversioner, by the heir of the disseisor or his ancestor.

21 Jac. 1.

c. 16.

1 Burr. 119.

And now, by the statute of limitations, "none shall make an entry into land, but within twenty years after their right or title shall first descend or accrue". But this act hath the usual savings for infants, *feme* coverts, &c. [Therefore where there hath been no possession, for 20 years, either in

the lessor, or the plaintiff, or his ancestors, the plaintiff in this action will be nonsuited; unless he can account for the want of it, under some of the exceptions allowed by the statute.

And twenty years adverse possession is not only a negative bar to the action or remedy of the plaintiff, but a positive title to the defendant. And therefore where A. had the possession of lands for 20 years, without interruption, and then B. got into possession, in which A. was put to his ejectment; here, though A. was plaintiff, yet his possession for 20 years was deemed a good title, and he recovered accordingly. Of reviving antiquated claims there would be no end; and therefore a long possession may be considered a better title than can commonly be produced. It supposes an acquiescence in the other claimants, and that acquiescence supposes also some reason, tho' perhaps unknown, for which the claim was forborne.

But it seems that the king is not affected by the statute of limitations; and this privilege is derived to his lessee; as where A. has a lease for ninety-nine years from the crown, and is out of possession for more than twenty years, yet he may recover in ejectment; for A. hath the king's possession, and the king is privileged from *non claim*, according to the maxim

1 Burr. 119.

Burr. set. cas.

451.

Salk. 421.

11. Mod.

2 Leon. 206.

Cro. El. 331.

maxim quod nullum tempus occurrit regi. This maxim, which constitutes a part of the king's prerogative, obtained universally at the common law, and with good reason; for the law intended the king to be always busied for the publick good, and therefore that he had not leisure to assert his right within the time limited to his subjects; but now by the 9 Geo. 3. c. 16. a time of limitation is extended to the case of the king, who is thereby disabled to make title, except to liberties and franchises, beyond the space of 60 years, to be reckoned backwards from the time of commencing any suit, or proceeding, to recover the thing in question. So that now a possession for 60 years will even be a bar to the king's prerogative, in derogation to the antient maxim before mentioned.

But if the crown grant the reversion, the privilege doth not follow it, in the hands of the grantee.

Ibid.

2 Keb. 127.

Nor is a common person affected by the statute of limitations, where the Possession is in the hands of his tenant, who has paid him rent within the time of limitation; for the possession of a lessee for years is the possession of his lessor, and payment of rent is an acknowledgment of such possession: So that during the continuance of the lease and payment of rent, the lessor

lessor is in no sort of default, for he cannot enter and take the actual possession till the lease be expired: but then it seems that he should; because his right of entry then first accrues.

[The possession of one joint-tenant is the possession of the other, so as to prevent the statute from being a bar in ejectment; for each joint-tenant hath a right to the whole, and therefore the entry and possession of one, is as good as that of both: and so it is of coparceners.

6 Mod. 44.
Salk. 205.
5 Burr. 2635.

If a declaration in ejectment be delivered within twenty years, and a trial had, whereby there is a confession of lease, &c.; yet if the plaintiff, being nonsuited in that action, bring another after the end of twenty years, the confession in the first action will not be proof of an entry, to bring the case out of the statute of limitations: for in such case, it seems there must be an actual entry.]

Caf. K. B.
573.

If the king has judgment in an information of intrusion, this does not hinder a third person, a mere stranger to the suit, from entering and bringing his ejectment; because the king makes no title by the record of this judgment. And no *habere facias seisinam* issues, because the information does not suppose the king to be out of

Hard. 460.

C

pos-

possession, but the contrary; and that a stranger intruded on him: and therefore on this judgment an injunction only goes to the party, and all claiming under him. But such judgment cannot bind a stranger, so as to take away his right of entry, to try his title in ejectment; because the king does not acquire any title by that record.

Hard. 176.

So if *A.* be outlawed, and his lands are extended upon an inquisition, such outlawry and inquisition do not take away the entry of a third person, who claims title to the lands extended, but leave him his remedy, by ejectment, for recovery thereof. For the king acquires no title or interest in the land, but only to the PROFITS, by the outlawry: and the possession of the lands still being in *A.* it were absurd to suffer his outlawry to privilege it against the entry of a third person, who might have been disseised of that land. But an intruder upon the king's possession can neither have an ejectment himself, nor make a lease to another, on which his lessee can maintain an ejectment; because no man can recover in this action who hath not the possession, and a right of entry into it: the former indeed is alledged in the declaration, and must be proved by the
the

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the confession of entry; but the rule of court is not so understood, as to make any part of the plaintiff's title, or to better it. And as the king is not in possession, but by matter of record, so neither can he be turned out of possession but by matter of record; consequently the intruder is not understood in law to gain any possession by his intrusion, and therefore cannot have this action, in which the possession is recovered.

But where the possession is not actually in the king, but in lease to another, there if a stranger enter on the lessee, he gains the possession, without taking the reversion out of the crown; and may have his ejectment to recover that possession, if he be afterwards ousted: for there is a possession in *pais* and not in the king; and that possession is not privileged by the king's prerogative. Hence it follows, that the king's lessee may likewise have an ejectment to punish the trespasser, and to recover the possession which was taken from him.

A. covenanted to stand seised of land, to the value of 100*l.* *per annum*, to the use of himself for life, and after to the use of his daughters successively, who should be

2 Leo. 206.
Cro. Eliz.
331

Cro. El. 800.
Noy. 33.

unmarried at the time of his death, till they should severally receive and levy 500 *l.* a-piece; remainder to his son. *A.* died the 30th of *Eliz.* and the son entered and possessed the land, in disturbance of the daughters, till the 42 of *Eliz.* when the eldest daughter (there being four of them) brought her ejectment. But she did not recover the land; because her entry was taken away, by suffering the son to enjoy it whilst she might have entered and levied her portion; and because she would otherwise keep the rest of the daughters from the perception of the profits: and therefore it was held, that she had no other remedy but against the son, who had received the profits in her prejudice.

1 Lev. 170.

1 Sid. 223,

262, 344.

1 Sand. 112.

1 Keb. 784,

915.

2 Keb. 20.

184, 270,

295.

Raym. 135,

158.

If a rent be granted in fee, or otherwise, to *A.* with a clause or proviso, in case it be in arrear, to *enter* and hold the land, till the arrears be satisfied out of the profits thereof; if the rent be in arrear, *A.* may recover the possession in ejectment: for this proviso creates an interest in the land, to answer the rent. And regularly, whoever hath an interest, may demise the same to another, consequently the person claiming under such demise, may maintain an ejectment. And this is now a settled point,

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point, whether the rent be created by grant at common law, or by way of use. And in this case it was formerly holden that there must be an actual entry made; because the title of the land accrues by the grantee's entering. It was however settled by lord Hale, long prior to the statute of 4 G. 2. c. 28. that, in such case, the GENERAL CONFESSION was sufficient, without the proof of an actual entry. [And now, by that statute; "in all cases between landlord and tenant, when half a year's rent is in arrear, for which no sufficient distress can be found on the premises, and the landlord hath right by law to re-enter for the non-payment, he may, without any formal demand or re-entry, serve a declaration in ejectment, in the manner stated hereafter; and, on proof of the above circumstances, he shall recover judgment and execution, as if the rent in arrear had been legally demanded, and a re-entry made."

Ld. Raym.
750.
Salk. 259.
post.

By the same statute (§. 2.) "in case the tenant shall suffer judgment and execution in such ejectment, without paying the arrears and costs, or filing a bill in equity within six calendar months after execution, he shall be barred from all relief in law or equity, other than by writ of

C. 3

"error;

"error; and the landlord shall hold the
"premises discharged from the lease."

2 Salk. 597.

* But by § 4. of the same statute, which seems to have been only a declaration and affirmance of what had been previously determined, "if the tenant, before the
"trial, pay to the landlord, or tender and
"bring into court, the arrears and costs,
"all further proceedings shall cease; and
"if the tenant be relieved in equity, he
"shall enjoy the premises under the old
"lease, without obtaining a new one."

And by the 7 G. 2. c. 20. "where an
"ejectment is brought by a mortgagee,
"to recover the possession of mortgaged
"premises, if the person who has a right
"to redeem, shall appear and pay to the
"mortgagee, or bring into court, the prin-
"cipal interest and costs, to be computed
"by the proper officer, he shall be dis-
"charged from the mortgage; and the
"court shall, by rule, compel the mort-
"gagor to reconvey the premises, and to
"deliver up all deeds, relating to the title
"of the same."

Co. Lit. 211.
b.

The law will always lean against forfeit-
ures, as courts of equity will always relieve
against them; and therefore if the lessor
accept rent of his lessee, after a condition
broken, he cannot enter, nor consequently
main-

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maintain an ejectment, for the breach of that condition; because he thereby affirmeth the lease to have continuance.

So it hath been holden, that if the lessor bring an action of covenant for the non-payment of rent, subsequent to the time of the demise laid in the declaration of ejectment, he thereby waives his right of entry for the forfeiture, and acknowledges that the covenant still subsists.

Roe ex dem. *Bul.*
Crompton *v. C.*
Minshull,
East. 33 G.
2 B. R.

Where the tenant holds the premises of the lessor of the plaintiff, it is sometimes necessary to give the tenant notice to quit possession, in order to maintain an ejectment. Here we may observe that demises, where no certain term is mentioned, are held to be tenancies from year to year, which neither party can determine, without reasonable notice to the other. This notice is, in most counties, six months preceding that part of the year when the tenancy commenced; and therefore it hath been holden, that half a year's notice, to quit possession, must be given to such tenant, before the landlord can maintain an ejectment; unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant; in which case no notice is necessary. And the same law will apply to the executor of such a tenant.

Black. Com.
2 V. 147.

Throgmorton *v. Whelpdale*. *Bul.*
B. R.
Hil. 9 G. 3.

3 Will. 25.

C 4

But

Bury affizes,
1775.

But White ex
dem. What-
96. v. ley v. Haw-
kins. Mich.
14 G. 3.

on Easter Term,
1779. B. R.
M. S. penes
me.

But after the expiration of a lease for a certain term, the tenant, continuing in possession, is deemed a trespasser; and therefore an ejectment, which is an action of trespass, may be brought, without any notice to quit. So a mortgagee need not give any notice to quit, if he only mean to get into the receipt of the rents and profits; even though the mortgage be subsequent to the lease: but in such case, he will not be suffered to turn the tenant out of possession.

On a motion for a new trial, in ejectment the case turned on the sufficiency of the notice to quit; the notice being to quit at the end of six months, or pay double rent. Verdict for the plaintiff. It was now contended, on the part of the defendant, that the notice was conditional; and that it was therefore optional in the defendant either to quit, or keep possession on the payment of double rent. But the court were unanimous in opinion, that the notice was sufficiently valid, to found the ejectment.

II. Of what things it will lie; and how they are to be described.

It is before observed, that originally in this action only damages, and not the possession itself, was recovered. But as terms or years began to swell to a great length, and were by such means, put out of the power of the freeholder; and from the many advantages which they had of the freehold itself, not being subject to those duties which were imposed upon the freehold, it became reasonable and necessary to give the writ of *habere facias possessionem*, in order to recover the possession itself. When the possession therefore was given in this action, it became necessary to confine it to such things as the sheriff might have recourse to after judgment, to deliver the possession of. But after the formation of the action, the courts did not confine it to the rules in the register which govern the *præcipe*; but allowed it to be brought for some things which could not be demanded in a *præcipe quod reddat*.

Thus it hath been held, that an ejectment doth lie of an orchard; because it is a word of certain signification, though in a *præcipe* it must be demanded by the name of a garden; and it being well enough under-

Cro. El. 854.
Cro. Jac.
654.
Noy. 37.

understood, the sheriff may with certainty deliver it upon an execution.

Cro. El. 818.
1 Lev. 58.
Style 215.

So an ejectment has been allowed for a stable and a cottage; because they are words of a determinate signification, and may be delivered by the writ of execution.

Cro. Jac.
654.
Palm 337.

An ejectment of an house, is good, though in the *præcipe* it ought to be demanded by the name of a messuage; because the ejectment is an action of trespass in its nature, and as trespass, "wherefore he broke "into the house," has been allowed, so they allowed it to be good in ejectment. Besides, the import and certain signification of the word *domus*, or house, is well enough understood in the law; for in waste the thing itself is recovered besides damages, and yet the action of waste is given *de domibus*.

3 Leon. 210.

So an ejectment of a chamber in the second story of such an house, was held good; there being certainty enough to direct the sheriff in the execution: and in that case it was said that an ejectment *de unâ roomâ* had been adjudged good. [It has even been held that an ejectment for part of a house in *A.* is well enough; for the same certainty is not required in an ejectment as in a *præcipe*.]

Stra. 695.
and see Cro.
Eliz. 286.

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But an ejectment of a kitchen is bad; Noy 109.
for though the word is well enough understood, yet because any chamber in an house is applicable to that use, the sheriff hath not certainty enough to direct him in the execution; and the kitchen may be changed between the judgment and execution.

An ejectment lies not of a close, because it is of an uncertain extent; nor will it mend the declaration though the close be called by a particular name, because that also leaves the extent of it uncertain, so that the sheriff cannot tell what quantity of land to deliver in execution. For the same reason, it hath been held, that an ejectment lies not of a *PIECE of land*.
11 Co. 55.
1 Rol. Rep. 55.
1 Salk. 254.

So it hath been held, that an ejectment will not lie for the third part of a close, or the fourth part of a meadow, without setting forth the particular contents, or number of acres.
Owen 12.
Cro. El. 399.
1 Lev. 213.

And the number of acres must be expressed with certainty; and therefore an ejectment of forty acres of land, by *estimation*, is not good. And though the number of acres contained in the close or piece of land should be mentioned in the declaration, and be set forth to belong to a messuage for which the ejectment is also
Ley 82.
Cro. Car. 471, 573.

also brought, yet even that hath been held too general; because the nature and quality of the land is thereby left uncertain, so that the sheriff is still at a loss what to deliver the possession of, as whether meadow, pasture, &c.

Cro. Jac.
435.
Palm. 102.

But an ejectment for a close, called *D.* containing three acres of land, was held to be well enough; because the quantity of land is mentioned, and also the quality; for the word *terra* signifies in law arable land.

Cro. Jac.
435.

So an ejectment for two closes called higher and lower *Gulwell* was held to be sufficient, without expressing the number of acres in each close. *Tamen quare*: for it hath been adjudged that an ejectment for five closes, called long furlong, containing ten acres of arable and pasture, is naught; because it is not specified how many acres there are of each, and consequently the sheriff hath no rule to govern himself by in the execution.

Cro. Car.
573.
1 Salk. 254.
1 Show. 338.
Carth. 204.
4 Mod. 97.

3 Lev. 96.

But an ejectment for a certain place called the vestry in *D.* is well enough; because that place belonging to a church, called a vestry, is perfectly known; and therefore the thing demanded is sufficiently described, to have execution thereof.

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An ejectment for a messuage or tenement is too uncertain, the word tenement being of a more extensive signification than the word messuage; and consequently it is uncertain what is demanded by the ejectment. [And for the same reason, it has been held that an ejectment will not lie for a tenement only.]

Styles 364.
Cro. El. 186.
Cro. Jac.

125.
Barnes qto
edit. 173.

Stra. 834.

But an ejectment for a messuage or tenement, called the *Black Swan*, is good; because the addition reduceth it to the certainty of a dwelling house.

1 Sid. 295.

So an ejectment for a messuage or bur-
gage, in *H.* is good; because both signify the same thing in a borough.

Hard 173.
Poph. 203.

So it hath been held, that an ejectment for a messuage or dwelling house is well enough; for messuage and dwelling house are synonymous terms.

An ejectment did not lie, while the proceedings were in latin, *de repositorio*; because it signifies a voider or cupboard as well as a warehouse, and therefore it was uncertain what was demanded: but if it had been with an *Anglicé* a warehouse, this had confined it to that particular thing.

Cro. Car.
555.
1 Jones 454.
S. C.

[It is said to be the design of the law in this action, to have the thing demanded so particularly specified, that the sheriff may certainly know what to give the possession of,

Ld. Raym.
1470.

and 680. 1 Burr. 629.
5 Burr. 2673.

1 Burr. 629.

of, if the plaintiff should recover; for the judgment is in order to execution, and the judgment would be vain if execution could not be had of the thing specifically demanded: and yet, at this day, the practice is for the sheriff to deliver possession, according to the direction of the plaintiff, who therein acts at his peril. But in this action the judges do not confine themselves to those rules which govern the *præcipe*; for they allow some things to be recovered in this action, which cannot be demanded in the *præcipe*: because, since the establishment of that real action, many things have been added and improved by art, which have acquired new appellations, that are now perfectly understood by the law, though they are not to be found in the ancient law books: and as men began to contract by such new appellations, it was but reasonable to suffer the remedy to follow the nature of the contract. Indeed whilst ejectments were compared to real actions, and arguments were drawn, by analogy from them, they must, of course, have been fettered: and this was very much the case till after the reign of king *James* the first. But of later times, an ejectment has been considered with more latitude and greater liberality;—as a fictitious action to try

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ry titles with more ease and dispatch, and with less expence to the parties. Hence it hath been said that an ejectment will lie for an hop-yard. And for the same reason, it hath been held that an ejectment will lie for *alder carr*, which is a term well known in *Norfolk*, where it signifies land covered with alders. In the same case, it was said by *Lee*, justice, that in *Yorkshire* it is common to bring ejectment for cattle gates; and agreeably to this, it hath been held that an ejectment will lie for a beast gate, which is a term used in *Suffolk* to denote land and common for one beast.

But the judges anciently, would not extend this action as far as they went in the assize; because there the recognitors, having a view of the thing demanded, must have had a more certain knowledge of it, than can be given in ejectment; and therefore it was held that an ejectment would not lie *de croft*, though an assize would. But if an ejectment be brought for a croft and an acre of meadow, and the plaintiff hath a verdict, he may have a special judgment for his acre of meadow, releasing the cost and damages for all; for he was allowed his costs, because by the judgment he had a just cause of suit against the defendant. It may however lie for a croft, called *Blackacre*.

Palm. 337.

Str. 1063.

Id. 1084.

Andr. 106.

Dyer 84. b.

Styl. 30. but
see Style 194.

1 Lev. 58.

An

Cro. Car.
471, 573-

An ejectment was brought for a messuage, and forty acres of land meadow and pasture thereto belonging, without specifying how many acres there were of meadow, and how many of pasture; and for this reason the judgment was reversed, on a writ of error.

1 Mod. 90.
Cro. Car.
179.

But an ejectment for twenty acres *juncorum et bruerarum*, was held to be well enough; because both are lands of the same nature, viz heath, on which gorse and furze grow; and therefore the words are understood to have the same certain signification in law.

5 Burr. 2672.

[So it hath been held that an ejectment will lie for fifty acres of furze and heath, and fifty acres of moore and marsh. Yet an ejectment for one hundred acres of waste, or *pro centum acris montis*, was held to be naught for the uncertainty; because both waste and mountain comprehend several sorts of land.

Hardr. 57.
Palm. 100.
2 Rol. Rep.
166, 189.

Cro. Car.
512.

But it lies for one hundred acres of bog, in *Ireland*; because there, that word hath but one signification and comprehends but one sort of land. And it has been since determined that an ejectment will lie for *mountain*, in *Ireland*; because there, the word mountain is rather a description of the quality, than of the situation of the land.

Stra. 71.

And in a modern case, the following description was held to be sufficient; on a writ of error, after a judgment in the *Common Pleas*, affirmed in the *King's Bench*, in *Ireland*; viz. "five thousand messuages, five thousand cottages, ten thousand acres of land, &c; in all those the lordships, manors, and late dissolved abbey or monastery of *Boyle* and *Infemacranaw*; and quarter of land of *Tallagh*, in the town and tenement of *Boyle*, and fairs and markets thereunto belonging, in the county of *Roascommon*; and all those the lands and hereditaments called *Grangemore*, and part of *Sumternat*, &c. a large deer-park, &c; and the parsonage of *Longford*, &c; in the county of *Roascommon*; and a small park or field, in the possession of, &c."

1 Burr. 623.

An ejectment *pro quatuor molendinis* is good, without saying wind-mills, or water-mills; because both are comprehended under that name in the register.

1 Mod. 90.

So an ejectment *de decem acris pisarum*, was held good; for the court held ten acres of pease, and ten acres sowed with pease, to be all one, and therefore certain enough.

1 Brownl. 150.

An ejectment for a manor seems to be ill, without describing the quantity and species of the land contained therein. If the several sorts of land and messuages be not set

Latch 61.
Lit. Rep. 301.
Heth. 146

D

forth,

forth, and the jury find the defendant guilty, *quoad messuagium & curtilagium, et non culp. quoad residuum*, Quere, if this be a good verdict, on which judgment may be given.

Yelv. 118.

An ejectment was brought *de castro villa & terris*, without expressing the number and certainty of acres, and it was held to be insufficient after verdict, on a writ of error brought thereon; because it was too generally demanded, and it was impossible for the sheriff to know what quantity of land he was to deliver upon the *habere facias possessionem*.

2 Rol. Rep.
482.

An ejectment was brought for ten acres of wood and ten acres of underwood, and it was insisted on in error, that this was a *his petitum*; but the objection was disallowed, because they plainly are of different natures. And even those who argued for the error seemed, by their argument, to admit it; for they insisted that no ejectment lay for underwood, which shews it must be of a different nature from wood: but that objection was also disallowed, because the nature of underwood is so well understood in the law, that the sheriff will have certainty enough to direct him in the execution.

1 Burr. 133.

[An ejectment will lie for part of an highway; for though the king and his people have

have a right to pass over it, yet the freehold, and all the profits, belong to the owner of the soil: and the sheriff may give him possession, subject to the right of the king and his people. But it must be described as *land*; and though it be built on, yet such description will be sufficient.]

So an ejectment lies for a coal-mine, because it is not to be considered as a bare profit *apprender*, a coal-mine comprehending the ground or soil itself, which may be delivered on the execution. And though a man may have a right to the mine, without any title to the soil, yet the mine itself being fixed in a certain place, the sheriff has a thing certain before him to deliver execution of.

An ejectment was brought *de mineriis carbonum* in *Gatefold*. The action was brought in the county palatine of *Durham*, and the plaintiff had judgment, and on a writ of error that judgment was affirmed, though it was not said, in the declaration, how many coal-mines there were. The reason seems to be, because the word being in the plural number, comprehended all the mines in *Gatefold*.

But for a rent, or common *apprender*, as common in gross, &c. or other things that lie merely in grant, no ejectment lies, be-

Cro. Jac.
150.
Noy 121.

4 Mod. 143.
1 Show. 364.
Salk. 255.
Carth 277.
Comb. 201.

Co. Lit. 9. a.

cause these, being incorporeal things, are in their nature invifible, *que neque tangi nec videri poffunt*; and therefore not in their nature capable of being delivered in execution. [But for common *appendant* or *appertinant* an ejectment will lie; becaufe the fheriff may give the poffeffion of fuch common, by giving poffeffion of the land to which it belongs.]

Str. 54.

Cro. Car.

492.

Cro. Jac.

146.

[8 Mod. 277.]

Yelv. 143.

1 Brownl.

142.

Cro. Car.

492.

Cro. Jac.

150.

1 Lev. 114.

Sid. 161.

An ejectment *de piscariâ*, in fuch a river, has been held ill, for the reason above. So an ejectment *pro quodam rivulo five aque curfu*, called *D.* doth not lie; becaufe it is impoffible to give execution of a thing which is tranfient, and always running.

But it feems that an affize will lie for a *piscary*; becaufe it is *proficuum in certa loco capiendum*.

This action hath been allowed for a boilary of falt; that is, as I underftand the cafe, where there is a well of falt water, and a man hath no inheritance in the foil of it, but only a leafe or grant of fo many buckets of the water as will arife, which are called boilaries: now, if any one withhold the buckets of water from the grantee he may bring his action of ejectment. And this differs from the former cafe; becaufe in *that*, the thing demanded was tranfient and always running; but here the water is fixed

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fixed in a certain place within the bounds and compass of the well, and is considered as part of the soil; and therefore Sir Edward Coke says, that by the grant of a boilary of salt, the soil itself passes.

Co. Lit. 4. b.

Hence it is, that an ejectment lies, *pro stagno*; because in law the word *stagnum* comprehends both land and water. So an ejectment *de gurgite* is good for the same reason. In the case of a river, if the soil or ground, on which the water runs, belong to the plaintiff, he ought to lay his action for so many acres of land *aquæ cooperæ*; but when the running water only belongs to him, and the soil to another, then the remedy is by action on the case, for diverting his water-course.

Co. Lit. 5.
Register,
227.

Ibid.
Yelv. 143.
1 Brownl.
142.

An ejectment lies *pro primâ tonsurâ*; that is, as I understand the book, if a man hath a grant of the first grass which grows on the land every year, he may recover it in ejectment of him who withholds it from him; for the first grass, or *primâ tonsurâ*, is the best profit and grant of the property, and therefore he who hath it shall be esteemed the proprietor of the land itself, till the contrary be proved; for the after grass or feeding is in the nature of commonage. As therefore he who hath the first grass, or *primâ tonsurâ*, hath the most signal

Cro. Car.
362.

profit of the land, and may keep it longer, or shorter on the land, according to the season of the year, it is but reasonable to give him this remedy against the person who ousts him of it: especially since it is a fixed determinate thing, which the sheriff may put him in possession of, and which distinguishes it from a right of common or other profit, *apprender*: for the commoner cannot assign any one acre which he hath a right to separate from the rest of the commoners; whereas the grantee of the first grass, has in reality a right to the land itself, till the crop be taken off; for no man can enter on the land till that be off, without being a trespasser.

Hardr. 330.

For the same reason an ejectment lies *pro herbagio*; because the herbage is the most signal profit of the soil, and the grantee hath at all times a right to enter and take it.

1 Lev. 213.
1 Sid. 416.

But an ejectment lies not *de pannagio*; because this is only the masts which fall from the trees, which the swine feed on, and not part of the soil itself, as the herbage is.

Dal. 95.

Yet an ejectment lies, *pro pastura centum ovium*, that is for so much land as will feed one hundred sheep.

Co. Lit. 159.

Though tithes are esteemed part of the incorporeal inheritance, and by the common law were only of ecclesiastical consequence,

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fance, yet being in the hands of lay-proprietors, they are now, by act of parliament, considered as a temporal estate. The 32 Hen. 8. c. 7. enacts, "that every lay person having
"any estate of inheritance, freehold, term,
"right or interest in tithes, and being
"thereof disseised, deforced, wronged, or
"otherwise kept from the same, shall have
"his remedy in the courts of law for them
"in like manner as for lands." Hence

came the ejectment for tithes. It is however given only to lay impropiators: for the act leaves spiritual persons to pursue the old remedy in the spiritual court, the words only extending to such tithes, pensions, oblations, and other spiritual and ecclesiastical profits, as are made temporal, or admitted to be and abide in temporal hands, or for lay uses. [This doctrine hath since been extended, by analogy, to tithes in the hands of the clergy.]

Ibid.

Cro. Car.
301,
Ld. Raym.
789.

And the ejectment for tithes, lies only against the person claiming or pretending to have title thereto: and not against such persons as refuse or deny to set them out, by which is meant subtractors of tithes. In every such case the lay-person is, by the express words of the act, left to his remedy in the spiritual court.

See 27 Hen.
8. c. 21.
32 Hen. 8.
c. 7.
2 & 3 Ed. 6.
c. 13.

D 4

In

11 Co. 25.b.
1 Rol. Rep.
68.

Dyer, 84, 5.

Ibid 116. b.

T. Jones 321.

In this action the plaintiff must be as particular and certain in his demand of the tithe, as he would be of land; and therefore an ejectment *de omnibus et omnimodis decimis in decem acris in D.* without saying *granorum et feni* was held to be ill, in the same manner as it would be for one hundred acres of land, without expressing the several natures and qualities of the land. But the plaintiff is not obliged to set forth the quantity of every sort of tithe, as he is of every sort of land; because tithe is in its nature uncertain, the quantity depending intirely on the goodness and fruitfulness of the land and season; and therefore an ejectment, *de quiddam portione granorum & feni* was held good, it being impossible to say how much the quantity would be. But though an ejectment lies of tithes in kind, yet it does not lie where the tithing consists in *modo decimandi*, or the payment of an annual sum, in satisfaction of tithes.

The plaintiff declared on a lease for tithes, belonging to the rectory of *D.* in *R.* and that the defendant entered upon him, and took such tithes, severed from the nine parts in *R.* without saying that they belonged to the rectory of *D.* and this was erroneous; because he did not confine the
ouster

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ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in *R.* which did not belong to the rectory of *D.*—

But in an ejectment for tithes, the plaintiff is not obliged to lay it for the rectory, or chapel, as well as for the tithes belonging to it; because the plaintiff may be ousted of the tithe, and not of the whole rectory, or chapel: and a man is not obliged to sue for more than is withheld from him.

Cro. Car.

301.

T. Jones

321.

There seems, according to *Rolle*, to be one circumstance peculiar to the ejectment for tithe: and that is, in the time of laying the entry, and ejectment. *Rolle* says, that where the declaration set forth the ejectment to have been in *May*, it was ill, because there could be no tithes, to be ousted of, at that season of the year. This does not seem to be law; because the law does not judicially take notice when tithes arise.

1 Rol. Rep.

68.

At common law, an ejectment lay for a rectory, which consists of a church, glebe lands, and tithes, and which therefore much resembles a manor; for the church may be very aptly compared to the lord's mansion-house, the glebe lands to his demesnes, and the tithes to his services. But evidence of tithes only, is not evidence of a rectory

Litch. 62.

rectory; and therefore it has been held, that where the plaintiff could only prove that the defendant took the tithes, belonging to the rectory, there was no evidence of the ejectment, or ouster of the rectory.

11 Co. 25. b.
Sty. 101.
Doct. plat.
291.
Salk. 256.

It was formerly held that an ejectment did not lie for a chapel, because it was *res sacra*, which was not demisable; but now, since they are become lay-inheritances, they are recoverable in ejectment, as other lay-estates: but it should be demanded by the name of a messuage, or it is not formal. And if the service of the declaration, be made on the chapel wardens, or on the person who keeps the keys of the chapel, it will be sufficient.

IV. Of the writ or process in this action.

Every ejectment was antiently begun with a *pone*, as in trespass; the ejectment indeed being a species of trespass; for the ousting of any person of his term, comes properly under that denomination; and therefore the original was a *pone* in this form.

F. N. B. 220.
G.

Rex vlt. salutem. Si H. B. fecerit de securum de clamore suo prosequendo, tunc pene per vadias Et solvas plegios G. D. nuper de L. gen. ita quod sit coram iust. nostris apud Westm. (tali die)

Y1017

often-

ostensus quare vi et armis manerium de B. quod prefat. T. dimisit A. ad terminum qui nondum preterit intravit & ipsum a firma sua predicta ejecit & alia enormia ei intulit ad grave damnum, &c.

The old writ runs thus—

Manerium &c. intravit; & bona & catalla ejusdem A. ad valentiam 10 s. in eodem manerio inventa cepit & asportavit; ipsumq' a firma, &c.

Ibid.
Plowd. 229.

The form of this writ seems to have been taken from the assize, which says, *Fatis tenementum illud reseisiri de catallis quo in ipso capto fuerint, & ipsum tenementum cum catallis esse in pace usq' ad prim' assisam, &c.*

Reg. Brev. 196.

The reason why the writs upon such disseisins and ousters, were extended to goods and chattels as well as to the lands, was, because anciently, such disseisins were made by violence; the disseisors not only taking away the lands, but generally also the stock that was upon them. For removing these forcible intrusions of one lord upon another, by the power of the king was the assize invented, and after the model of that was the ejectment framed.

Upon the old writ the register has this remark, that it cannot be *de bonis & catallis asportatis*, because, in an action for such goods, a man shall have an *exigent*, but

Regist. 227.

but in a writ of ejectment *distress infinite*.
 Plowd. 228. Judge *Brown* observes, that this rule was
 ill taken; because process of outlawry lies
 in ejectment, as well as distress infinite.
 F.N.B. 220. And so is *Fitz Herbert*. In truth it seems
 K. that the writ is good either with or with-
 out these words; and the reason is, that a man
 must accomodate his writ to the nature of
 his case; and the precedents are both ways,
 according as the ouster has been with the
 taking away of chattels, or not. The assize
 Plowd. 229. indeed has always the clause *de catallis*,
 because they recovered damages in the assize
 for the mesne profits, which was one of
 the points complained of in that writ;
 and the old form has always been invari-
 ably observed in that action. But an
 ejectment is not a proper action for the
 mesne profits, though it may comprehend
 the chattels which were taken in the very
 ouster; because it was never laid with a
continuando, as in an action of trespass for
 the recovery of mesne profits, and there-
 fore could not comprehend the mesne pro-
 fits that were taken during the whole ouster,
 since every act is a new trespass. The
 assize indeed punishes the whole disseisin,
 by giving commensurate damages from the
 first act till the time of the action brought,
 as one intire disseisin.

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The writ itself, like all other writs of trespass, is an attachment, and the forms of attachments run in the same words, *pone per vadios & salvos plegios, &c.* Whereas, in other personal actions, they began with the writ in nature of a summons, commanding the party to restore the thing in demand, before they came to an attachment. The reason of the difference is, because in this writ, and in all other cases of trespass, the party complains of a breach of the peace, whereon there is a fine due to the king, therefore they give the party no warning, lest he should withdraw himself; but in debts, since the plaintiff trusted the defendant originally, it is but reasonable that he should give him further credit till he be summoned to appear. Besides, in trespass there was a *capias* on the person, because of the king's fine, which *capias* was generally used as the second process, and therefore the first was upon his goods; whereas, in other personal actions, the whole process at common law was on the goods only.

Upon this attachment the sheriff returned pledges *de prosequendo* on behalf of the plaintiff; and pledges for appearance on behalf of the defendant. The latter were either proper persons who undertook for his appearance.

pearance, or else his goods, which were forfeited on his non-appearance. Pledges for the plaintiff were taken under these words in the writ, *Si a fecerit te securum de clamore suo prosequendo*; and pledges for the defendant were taken by these words, *pone B. per vad. Et salvo pleg.* And so it was in an assize, where there are the same words in the writ.

F. N. B. 220
H.

The second step in this action was either by *capias* or distress infinite. The distress was the process of the party, the *capias* was the process of the king. For in all personal actions, as before observed, they proceeded by summons, attachment, and distress infinite; in all criminal prosecutions, and in all prosecutions for fines due to the king, they proceeded by *capias*. But in trespass, where the king required his fine for the prosecution, the plaintiff took hold of the king's process to oblige the party to appear.

Brit. Cap.
26.
2 Inst. 254.

If the party was *attached* by goods or pledges, and did not appear, the *distingas* issued upon all his goods and lands, to compel him to appear, which was called the *grand distress*, or *distress infinite*. If the sheriff returned *nihil* upon the *pone* then they proceeded to *capias* and *outlawry*; and the reason was, because it appeared by the return, that the defendant had

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had nothing whereby he could be compelled to appear. But the defendant had a remedy, if the sheriff did not actually serve the attachment, because the trial of such service was by examination of the sheriff's officers, on the plea of not being attached by fifteen days; and therefore, there was no false return against the officer for such return: and the rather, because the party was little, if at all, prejudiced, since he was discharged from the arrest on making a proper appearance. Hence the *capias* at length issued as the first process, without any *nihil* returned on the *pond*. And so when the *capias* was given in account, by the statute of *Marlebridge*, which was given to the lords when their bailiffs had nothing to answer, they first returned *nihil* on the *summons*, and then the *capias* issued; but for the reason before given, the *capias* afterwards issued in account as the first process; and so in debt, which was in the similitude of account, by that statute.

In ejectment it was said that the defendant was *summoned* to answer, and not *attached*,—the declaration was held ill upon a demurrer. But after a verdict and writ of error brought, if no original be found, whereby it appears there was a vicious proceeding by *summons*, it is aided by the statutes

Co. Lit. 6. b.
9 Co. 31. b.
Booth 9.

Br. Attachment pl. 12,
17, 18.

2. Inst. 143.
144.

1 Sand. 317.
1 Sid. 423.

statute of *Jeofails*, of the 18 *Eliz.* c. 14. which makes the proceedings good after verdict, though the original be wanting. And tho', if there had been a vicious original upon the file, it had been error, yet, when there is no original upon the file, it is helped by that statute, and the court will intend that there was a good original which is lost, and that the clerk has misrecited it.

1 Keb. 278.
281.
Jones 439.
Cro. Jac.
414.

The first words of the writ are, "*Si A. fecerit te securum de clamore suo*;" and these give authority to the sheriff to take pledges of the plaintiff; for the sheriff has no power to attach the defendant by virtue of the writ, unless the plaintiff first find security to prosecute his suit: therefore the sheriff must first return pledges *de prosequendo* upon the writ, though they be only *John Doe* and *Richard Roe*, or else the court hath no power to proceed. But though the omission of pledges be error, yet since only the roll is returned upon a writ of error, such error cannot be assigned till *diminution* be alledged by the plaintiff in error; upon which a *certiorari* issues to certify the original, which is the foundation of the suit. If upon such *certiorari* an original be certified, without pledges to prosecute, it is error; for though the statute of *jeofails* helps

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helps the want of an original after verdict, yet it does not cure an ill one. But if the court be moved before the certifying of such original, they will give the party leave to amend, by adding the pledges of prosecution, since they are now only mere matter of form, and the declaration is not delivered on the original writ, but by virtue of the rule. But it seems that the judgment given in an inferior court, is erroneous for the want of pledges; because pledges *de prosequendo* were originally taken to answer the king's amerciaments *pro falso clamore* of the plaintiff, in case judgment should be given against him; and the king gives no power to proceed without security be taken to answer his amerciements.

Cro. El. 722.
Yelv. 108.
1 Sid. 84.

The next words in the writ are, "*pone per vadios et salvos plegios*," which have been already commented upon.

If the word "*ostensurus*," be omitted in the writ it seems to be error; because the defendant is attached to answer, but otherwise it does not appear for what purpose.

The next words in the writ are, *quare vi et armis*, and, if these are omitted, it is an error incurable; because there must appear such a trespass in the writ as will give the king a fine, which cannot be, unless those words be inserted. The *capiatur fine*

1 Keb. 164.

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however, has been long taken away:—it was remitted by 5 W. & M. c. 12.—The plaintiff by that act is to pay six shillings and eight pence in satisfaction of the fine, which is to be allowed him in costs.

5 Mod. 285.
1 Salk. 34.

Palm. 404.

2 Vent. 173.
Hob. 249.

If the bill or writ, while the proceedings were in *Latin*, had been *unam clausum terre*, *i. e.* a close of land, instead of *unam acram terra*, *i. e.* an acre of land, it had been bad; because the particular quantities and certainty of the land are not set forth; but if there be a paper book in the office which has it *unam acram*, the court will amend the bill or the writ by such paper book; because then it appears to be only a misprison of the clerk. So, if the writ be *devist*, *i. e.* that he devised, instead of *demist*, *i. e.* that he demised, the court on motion will amend it.

The *TESTE* of the writ must be fifteen days before the return, which was anciently thought a sufficient time for the defendant to come from any part of the kingdom, to answer the plaintiff's demands, in the courts above.

Cro. Car.
91. 271.
Sty. Rep.
352.

If on a writ of error, the plaintiff in error alledge *diminution*, because the roll is sent without an original, upon which a *certiorari* goes for the original, and an original be returned, bearing date before the demise laid in the declaration, this *prima facie* is

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is bad : because there was no cause of action in the plaintiff at the time when the suit was commenced. But if upon the *sci. fa. ad audiend. errores* against the defendant in error, the defendant comes in and alledges for *diminution*, that THAT was not the original upon which he declared, the court will grant a new *certiorari*, because the plaintiff in error had the bringing in of the first original which was certified, and therefore might form mistakes in it, in order to reverse the defendant's judgment. And if upon such new *certiorari*, they certify an original, bearing even date with the demise and ouster, the court will intend that the action was founded upon the second original and not on the first, and the plaintiff in error will not be allowed to make any allegation to the contrary. But where the first original certified was before the demise and ouster, and the second original certified was after appearance and imparlance, there the court doubted whether either of the originals would be good; for the first was commenced before the plaintiff appeared to have a cause of action, and the second after the action commenced, and so not a sufficient foundation for the action.

Cro. Jac.
597.

A declaration was of *Michaelmas Term*, and the demise laid on the 30th of *October*,

2 Vent. 174.

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which

which was after the term began; and to help this a writ was purchased bearing teste the second of *November*; though it bore teste within the term, which was unusual, yet in order to cure the mistake which otherwise might be alledged in the plaintiff's declaration, after verdict, it was allowed to be good.

Cro. Car.
91.

So where on a first original upon the *certiorari* of the plaintiff in error, the demise appeared to be for three years, and the declaration shewed the demise to be for five years; upon the plaintiff's coming in and obtaining a second *certiorari*, he was permitted to purchase a new original to be certified thereon, setting forth a demise for five years conformable to the declaration.

Hob. 130,
134, 264,
281, 304,

The want of an original, after verdict, is helped by the statute of 18 *Eliz.*; and the want of a bill in the *King's Bench* is helped, in the same manner, by the equity of the same statute; for the bill in the *King's Bench* is in the nature of an original.

Hob. 249.

Where an action of ejectment, and an action of assault and battery were joined in the same writ, after verdict it was moved in arrest of judgment, because the battery was joined with the ejectment, and the damages being intire, the plaintiff could not release the damages in the battery, to take

take judgment and execution in ejectment.

But it seems, that if by the verdict, the damages be found severally, he may release the damages in battery, and take judgment in ejectment. The reason is, that, where the damages are entire, it does not appear that the plaintiff recovered by any title in ejectment; and therefore it cannot be seen by the court, whether these two actions were not originally joined, that the plaintiff might have a recovery in one of them to save his costs in the other. But where the damages are given severally, it appears that the plaintiff had a good title in both cases; and therefore if he release his damages in battery, which was mis-joined with the ejectment, there is no reason but he should take his judgment in ejectment; for though the court must judge the joinder of the action to be bad, where it appears to be a contrivance to save costs, which is the mischief of joining different actions; yet where there appears to be good cause in both cases, the joinder of the actions is cured by the release; for the plaintiff should have judgment according to his right.

1 Brownl.

235.

V. *The ancient practice; and in what cases it is still to be adhered to.*

The old way of proceeding in ejectment was, by sealing a lease on the premises by the party in interest, who was to try the title.

This at first was ruled not to be maintenance, nor within the statute for buying of titles, (since the lessor demises on the land and so is in possession,) if the lease was made to servants or friends, who could not be presumed either to maintain or countenance the action; but if it were sealed to one of ability to maintain the suit, this was properly maintenance.

Styles P. R.
165.

Lil. Pr. Reg.
498.

If a man seal a lease upon the premises, he need not give notice to the PARTY IN INTEREST, at the time of his entry, or sealing such lease; but it is sufficient to give notice to the tenant in POSSESSION afterwards, where it was done, for that is sufficient notice for the party to make his defence; and it is not necessary that the plaintiff should give notice of his preparation, but of his trial.

8ty. Rep.
468.

By the ancient method, the person, who had title of entry, used to enter upon the several parcels of land, and deliver declarations in the name of his own casual ejector,

ejector, who did actually enter on the premises to eject; but the court required notice to the tenant in possession, that he might not be turned out without an opportunity of making his defence; and then such tenant in possession used to move the court, that as the title of the land belonged to him, he might defend in the casual ejector's name, (which the court upon an affidavit of that matter used to grant,) and that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless. Then the casual ejector was not permitted to release errors in prejudice of the tenant in possession, since the suit was carried on in his name by rule of court; though the process for costs was taken out against the casual ejector, and he was obliged to resort to the tenant in possession, who had undertaken to save him harmless.

In the old way of proceeding in ejectment, if there were several parcels of land in the possession of several persons, the mode was, to make several leases, and to deliver several declarations, upon such several leases, to the tenants in possession. And this was absolutely necessary when the freehold was in distinct persons. But where the freehold was in the same

Co. Lit. 252.
Palm. 402.

Co. Lit. 252.

person, there the difference was, whether it was in the same county, or not; for where different entries were necessary there were to be different leases. Before the late act of parliament, where there was one disseisor of lands in one county, though he demised them for years, or at will, to several persons, yet the disseisee might enter upon one of such lessees in the name of all, and make a lease according to the old method, and comprehend them all therein. The reason was, because the entry to divest freeholds, must be made according as the freehold divides itself. Therefore, if the disseisor had made a lease for life to three several persons, the entry must have been several, and the leases several also. If one had disseised me of two acres in the same county, and I had entered into one, without saying in the name of both, such entry would not divest the right; and therefore where there were several acres put in the same declaration, and the entry was made in the old way, it must have been in the name of all the acres named in such declaration; otherwise, (the entry being not interposed by words,) the act of entry could extend no farther than to the land into which the entry was actually made.

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To understand this, we must consider, that entry was the same thing with the vindication or *calumnia* in the civil law, and was of equal notoriety with the feoffment; for as the feoffment was anciently made upon the land *coram paribus*, who subscribed the feudal instrument in *hiis testibus*; so it seems the entry was made upon the land, and afterwards the claim recorded in the lord's court and hence called *clameum, vel calumniū apponere, vel advocare*. But afterwards they allowed the feoffment to be good, though it was attested by strangers out of the land, and not made or recorded *coram paribus*; though the manner of recording the claim of liberties, before the justices in *Eyre*, remained long after, as appears by the register, which seems to be a continuance of the ancient practice. But when the feoffment was not attested by the parties in *chartis*, yet they were attested and tried by the *pares comitatus*; and therefore if the land lay in two counties, the entry must have been made in each, because the attestation of both facts, if controverted, must have been tried by the *pares comitatus*.

If husband and wife make a lease by indenture, and in it make a letter of attorney to seal and deliver it as their deed,

Digest. Feud.
v. lib. 2. tit.
8. tit. 2.
Donarius
441. 2.

Yelv. 1.
2. Brownl.
248.
but see Cro.
Car. 165.
contra.

to

to the lessee upon the land; and such lessee, in order to try the title of the land, declare upon a lease made by husband and wife, it is bad; but if there be a necessity to try the title of the wife in the old method, the husband and wife must execute the lease upon the land, in their proper persons; because the wife, not being a proper person by herself, cannot constitute an attorney. But this practice, as to such instances, is now obsolete, since by the common rule, the demise is confessed, as supposed, to be made on the land.

I shall next take notice in what cases it is still proper to proceed after the old method.

Lil. pr. Reg.
490.

First, where the houses, or things, for which the ejectment is brought are empty: for in that case no declaration can be delivered, or affidavit made of the delivery of it, consequently the court cannot proceed to give judgment against the casual ejector; and therefore the party is forced to proceed the old way, by sealing a lease on the land, and giving rules to plead; and when those rules are out, the court, upon affidavit of the whole matter, will grant judgment. Yet there can be no judgment against the casual ejector, without moving the court, though the

Salk. 255.
pl. 3.

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the rules for pleading are out; because the court will not grant any judgment against the casual ejector, who is only nominal, without a proper affidavit; lest, otherwise a third person should be tricked out of his possession.

[But a very little matter is sufficient to keep the possession; and therefore where the tenant had left some beer in the cellar, and the landlord proceeded as on a vacant possession, the judgment was set aside.] Str. 1064.

So if the tenant in possession keep his door shut, the best way is to seal a lease on the land, as was usual before the new rules were invented; but it seems that in this case, if the practice and fraud of the tenant appear to the court by affidavit, the court will grant judgment against the casual ejector, *nisi*, &c. for then the fraud of the tenant supercedes the necessity of giving notice to him.

Secondly, When a corporation is lessor of the plaintiff, they must give a letter of attorney to some person, to enter and seal a lease upon the land; for a corporation cannot make an attorney, or bailiff, but by deed; nor can they appear, but by making a proper person their attorney by deed; therefore, they cannot enter

Carth 390.
Ld. Raym.
135.7

enter and demise upon the land in person, as natural persons can; nor can they substitute an attorney, to enter into a rule for their costs; nor will an attachment go against them for disobedience to that rule. Hence they are obliged to make an actual lease upon the land, which lease must try their title, and then the attorney may proceed in the common method, which is not altered by the statute.

• Dyer 86.

If a corporation be aggregate of many, they may set forth the demise in the declaration, without mentioning the christian name of the master or wardens of the corporation; but if the corporation be sole, the name of baptism must be inserted; as if the demise be made by a bishop;—because where the corporation is aggregate, the name solely consists in its character; but where it is sole, it consists totally in that person, therefore you have no sufficient specification of that person, without mentioning his name.

The *third* case in which the old method is to be observed, is, where the several interests of the lessor of the plaintiff be not known; and there, it is proper to seal a lease upon the premisses, lest they should fail in setting out in their declaration the several interest which each man passes;

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passes; and in that case it is the best way to proceed in the old manner, even now.

Fourthly, Where the proceedings are in an inferior court, they must proceed by actually sealing a lease, because they cannot make rules to confess lease, &c. inasmuch as such courts have not an authority to imprison for disobedience to their rules; and the reason is, that inferior courts, having but a limited authority, cannot make any new rules to bind persons who do not come in by the proper process of such court; but the courts above, having an unlimited authority in every thing within their jurisdiction, may bind any person who consents to their rules; and therefore in inferior courts the lease is sealed on the land, and the defendant tries the title in the name of the casual ejector, to save expence.

1 Keb. 690.
795.

If an ejectment be brought in an inferior court, and an *habeas corpus* be brought to remove it, and the plaintiff in the ejectment declares against the casual ejector, there may be a rule to confess lease, &c. as if he had originally declared in the court above, and the court will not grant a *procedendo*.

If an *habeas corpus* be brought to remove a cause in ejectment out of an inferior court,

2 Keb. 119.
1 Sid. 313.

court, and the lands lie within their jurisdiction, and the lessor of the plaintiff seal a lease on the premises, the courts above will grant a *procedendo*; because the title of the land is a local matter, properly within the jurisdiction of the court below, where, if they proceed regularly, they shall not be prohibited; but if the lessor has not sealed a lease on the premises, the courts above will not grant a *procedendo*.

2 Keb. 69.

If the lands do lie partly within the *cinque* ports, and partly without, the defendant cannot plead above, the jurisdiction of the *cinque* ports; for though the land be *local*, yet the demise is *transitory*, and triable any where; therefore, though the plaintiff may lay his action for that which lies within an inferior jurisdiction in the court below, if he take proper measures for that purpose; yet if he will lay it above, since the demise is *transitory*, the defendant cannot stop his proceeding, because the courts above, for such *transitory* matters, have competent jurisdiction.

It seems that if the defendant in an inferior court enter into a rule to confess lease, &c. and the cause be removed by *habeas corpus*, and the judge of the inferior court grant an attachment against the defendant for disobedience to the rule, the superior court

court will grant an attachment against such judge for compelling obedience to the rule, and thereby obstructing the business of the superior courts; since the defendant is not bound by the rule he entered into in the inferior court, such rule being only the practice of the superior courts.

VI. *The modern practice in ejectment; and herein, of the declaration.*

[Though the following system of practice is I believe, as correct as possible, yet, I cannot, for the reason alledged in the preface, take upon myself to answer for its uniformity.]

The ancient practice being almost done away, it is now not usual to make out a *capias* against the possessor upon an ejectment delivered; (as it was of old, when men were ousted of terms for years;) nor is it necessary, except in the cases before alluded to, to make an actual entry, or to seal and deliver leases, on the premises: but the party who claims title, *feigns* a lease, and in the name of the feigned lessee, who should be some real person to answer for the defendant's costs, delivers a declaration of ejectment, against the

6 Mod. 389.

[8 Mod. 119.

Str. 1211.

Barnes 4^{to} ed.

186.

Barnard.

K. B. 43,

116. Barnes

4^{to} ed. 172.]

the casual ejector, to the tenant in possession; or, if there be several such tenants, to each of them. This declaration is in the nature of process to bring in the tenant; and therefore a notice is subjoined, and delivered with it, which must be signed by the casual ejector and not by the nominal plaintiff, informing the tenant, that unless he appear, to defend his title, by a limited time, judgment will be entered against the casual ejector, and he (the tenant,) will in consequence be turned out of possession. This notice, and also the declaration to which it is subjoined, must be read or explained to the party served, at the time of the service: and if the ejectment be brought for premises in *London* or *Middlesex*, the notice should require the tenant to appear on the first day, or within the first four days of the subsequent term; but then the declaration must be delivered before the essoin day of that term. In country causes, or where the premises are situate in any other city or county than *London* or *Middlesex*, the declaration ought to be delivered before the essoin day of the issuable term, after which the cause is designed to be tried; and the notice, in such case, should require the tenant to appear in that term, *generally*.

Before

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Lil. pr. reg.
499.

[Before the statute of 4 G. 2. c. 28.] the declaration against the casual ejector must have been served, either on the tenant himself or on his wife, and could not have been served on any of his children or servants. The reason was, that the tenant, by having explained to him what was the meaning of the declaration, had sufficient warning to defend his title; and the court did not think it reasonable that this should come to him at secondhand, unless from his wife, who was presumed to be equally concerned in interest, with himself. And in that it differed from a summons, which might either be delivered to the tenant, or upon the land; the latter way was by the sheriff's coming upon the land, and summoning the party to appear, by setting up a white wand, which was antiently a mark that the land was claimed by others.

[But now by this statute, "in all cases
" between landlord and tenant, when half
" a year's rent is in arrear, for which no sufficient distress can be found on the premises, and the landlord has right by law to re-enter for the nonpayment; he may, without any formal demand or re-entry, serve a declaration in ejectment, for the premises in question, or in case

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“ the same cannot be legally served, or no
 “ tenant be in actual possession of the premis-
 “ ses, may affix the same upon the door of
 “ any demised messuage, or in case there be
 “ no messuage, upon some notorious place
 “ of the lands: and such affixing shall be
 “ deemed a legal service.”

Str. 1064.

Barnes 4to
 edit. 175, 6.
 188, 190,
 192.

The service need not be on the premises, if the tenant himself be personally served; but otherwise it must. And by the modern practice in ejectment, a service on the child or servant of the tenant is deemed a good service; provided it be made on the premises, and be afterwards acknowledged by the tenant.

2 Burr. 1116,
 1181.

But if the tenant abscond, or keep out of the way, to avoid being served, it is usual to serve a declaration on some person residing at his house, or, if that cannot be done, to affix the same upon his door; and then, upon an affidavit of the circumstances, to move the court for a rule upon the tenant, to shew cause, why such service should not be deemed sufficient: the court will prescribe the mode of serving the rule, which is generally made absolute on affidavit of service.]

Lil. pr. reg.
 499.

After the declaration is delivered, the person who delivered it must make an affidavit (except in the case of a vacant pos-

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possession) that he delivered to the tenant, or his wife, &c. a true copy of the declaration, and read or explained to him the notice annexed thereto. If the declaration was served on the child or servant of the tenant, the affidavit must state further, "that the service was afterwards acknowledged by the tenant".

[The affidavit required, where the declaration is served in pursuance of the 4 Geo. 2. before mentioned, is in substance as follows;—"That the declaration was fixed upon such a place, being the most notorious part of the premises in question, (there being no person in possession, on whom the declaration could be legally served); that half a year's rent was then due from the tenant; that no sufficient distress was to be found upon the premises to answer the arrears then due; that the late tenant held such premises by virtue of a lease from the lessor of the plaintiff; and that therein is contained a clause of re-entry for non-payment of that rent."

This affidavit must be positive, viz. that such a one was tenant in possession, or that he acknowledged himself to be so; because no man should be turned out of possession, without a positive affidavit, on

Caf. Pr. C.
P. 68.

Barnard,
K. B. 330,
429.

Lil. pr reg.
499.

which he may charge the person who makes it, with perjury.

Upon this affidavit the plaintiff moves for judgment against the casual ejector, which is always granted, unless the tenant in due time enters into the common rule, to confess lease, entry and ouster.

This motion is a motion of course, that is, such as only requires the signature of a counsel or serjeant, who delivers it over to the clerk of the rules in the *King's Bench*, or to the secondary of the *Common Pleas*.

In the *King's Bench*, if the premises are situate in *London* or *Middlesex*, and the notice requires the tenant to appear on the first day, or within the first four days, of the next term, the plaintiff should regularly move for judgment against the casual ejector, in the beginning of that term; and then the tenant must appear within four days inclusive after the motion, or the plaintiff will be intitled to judgment. If, however, the motion be deferred till the latter end of the term, the court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; though if the motion be not made before the last four days of the

the

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the term, the tenant need not appear, until two days before the effoin-day of the subsequent term. And should the notice in such case require the tenant to appear in the next term generally, the tenant hath the whole of that term to appear in.

In the *Common Pleas*, if the premises are situate in *London* or *Middlesex*, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment against the casual ejector, for default of appearance; unless such motion be made within *one week* next after the first day of every *Michaelmas* and *Easter* terms, and within *four days* next after the first day of every *Hilary* and *Trinity* terms. [But it has been holden that this rule does not extend to the case of a vacant possession, under the statute 4 *Geo. 2.*]

Reg. Trin.
32 Car. 2.
C. B.

Barnes 4to
edit, 172.

In country causes, though the declaration be delivered before the effoin day of *Easter* or *Michaelmas* term, yet the tenant, in both courts, is allowed till four days after the next issuable (that is, *Hilary* or *Trinity*) term to appear; and if the cause arise in *Cumberland* or in any other county, where the assizes are held but once a year, the tenant is not compellable to appear, till four days after the term preceding the assizes. But in the

Salk. 257.

King's Bench, the plaintiff must move for judgment the same term in which the tenant has notice to appear; though the practice is different in the *Common Pleas*, for there he may move for judgment at any time during the next issuable term.

Lil. Pr. reg.

499.

Comb. 209.

We shall next see what persons may defend in ejectment. And here it may be proper to observe that by the common law, no person is admitted to defend in ejectment, unless he be tenant, and is or hath been in possession, or receives the rent; because it is an act of champerty for any person to interpose, and cover the possession with his title; and if the party would make any person defendant with another, who was not concerned in the possession of the tenements, this was a mischief at the common law; because, if the plaintiff recovers against one of the defendants, the stranger had no remedy for his costs. But this was remedied by the 8 & 9 W. 3. c. 10. whereby costs are given to such strangers, unless the judge certifies immediately on the trial, that the plaintiff had a probable cause for making him a defendant.

Sec. 12.

[Now by 11 Geo. 2. c. 19. which was made to prevent fraudulent recoveries of the possession, by collusion with the tenant of

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of the land, "such tenant, being served
"with a declaration in ejectment, must
"give notice thereof to his landlord, un-
"der the penalty of three year's improved
"rent:" and, by the same statute, "the
"landlord may, by leave of the court, make
"himself defendant with the tenant in pos-
"session, in case he appear";—which in-
deed is no more than he had a right to
demand before the statute: "and in case
"such tenant shall refuse or neglect to ap-
"pear, judgment shall be signed against
"the casual ejector. But if the landlord
"shall desire to appear by himself, and con-
"sent to enter into the like rule as the
"tenant, in case he had appeared, ought
"to have done, the court shall permit him
"so to do, and order a stay of execution
"upon such judgment, till further orders."

Sect. 13.

Salk. 257.

7 Mod. 70.

3 Burr. 1301.

Upon this statute it hath been said
that the court has no jurisdiction to ad-
mit any person but the landlord, to de-
fend instead of the tenant; and therefore
where *J. L.* who claimed as devisee,
brought an ejectment against the tenant
in possession, and *J. S.* who also claimed
as devisee, moved the court that he might
be made defendant, instead of the tenant,
who had refused to appear, the motion
was denied.

Barnes 4to
edit. 193.

3 Burr. 1292.

But this doctrine was reprobated by lord *Mansfield* in a subsequent case, which was nearly similar with the former: and in which it was adjudged, that where the sole question turns upon "who should be landlord to the tenant in possession," the question ought to be tried between the claimants, and that the tenant should stand *neuter*, and his possession avail neither.

M.S. 1772.

~~In another case, it was said by lord~~ *Mansfield*, that when a person applies to be made defendant in the room of the tenant, it is not necessary that he should be the actual landlord; but that it is sufficient if he have a privity of interest in the lands: and therefore it should seem that a mortgagee, who is out of possession, may be admitted to defend, on the tenant's refusal; though in one case it is said to have been otherwise determined. And if the person who wishes to defend be neither tenant nor landlord, he must move the court, on an affidavit of the fact, to be made defendant instead of the casual ejector; but this can only be done with the tenant's consent.

Comb. 332.

3 Burr. 1299.

Barnes 4to.
ed. 1794.

Sty. 368.

As to the time when the landlord may be admitted defendant, the following case is remarkable. A judgment in ejectment had

4 Burr. 1996.

had been regularly obtained against the casual ejector, by default; and the landlord moved to set it aside, because his tenant had not given him any notice of the declaration. The plaintiff insisted that his judgment was perfectly regular; and that the tenant's omitting to give his landlord notice of the declaration, was merely a matter between the landlord and his tenant, which could not affect the plaintiff's regular judgment, fairly and duly obtained. The court were, however, of opinion, that the possession ought not to be changed by a judgment in ejectment without a trial, when a trial may be had; and therefore they set aside the judgment, upon payment of costs by the tenant, and admitted the landlord to defend in his stead. ¶

Where there are several defendants, to whom the plaintiff delivers declarations, who are SEVERALLY concerned in interest, and the plaintiff moves to join them all in one declaration; yet the court will not do it; but the plaintiff must deliver several declarations to each of them: because each defendant must have a remedy for his costs, which he could not have if they were joined in one declaration, and the plaintiff prevailed only against one of them. And by this means the plaintiff might have

Barnes 4to
edit. 176.

a tenant of his own defendant with others, in order to save the costs.

[But where several ejectments are brought for the *same premises*, upon the *SAME DEMISE*, the court on motion, or a judge at his chambers, will order them to be consolidated.

Having seen what persons may defend in ejectment, the next thing to be considered is, in what cases the defendant may claim security for his costs.

Str. 694,
932.
Hardw. 56.
1 Will. 130.

If an infant deliver a declaration to the defendant, some friend or guardian must be set up as plaintiff, to answer the defendant's costs. But if such person die insolvent, so that the defendant has no remedy by this rule, the infant himself must answer for the costs; because the rule was entered into for the infant's benefit: even infants must not disturb the possession of others, by unlawful entries, without being punished with costs.

Barnes 4to
edit. 183.

This practice of making a rule to stay proceedings in ejectment, upon the demise of an infant, until a responsible plaintiff be named, or security be given for the payment of costs, originated in the *King's Bench*, and was from thence transferred into the *Common Pleas*.

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It has likewise been holden that upon the death of the plaintiff's lessor, the proceedings may be stayed, till the plaintiff shall have given the defendant security, for his costs. So where an ejectment was brought, on the demise of a person residing at Antigua, and in another case where the lessor of the plaintiff resided in Ireland, the plaintiff was compelled to give the defendant a similar security.

Barnes 4to
edit. 147.
Str. 1056.

Cusack v.
Jones, Hil.
33 G. 2. B.R.
2 Burr. 1177.

The next thing to be considered is the COMMON RULE, or the rule to confess lease, entry, and ouster. Here it should be remembered, that judgment against the casual ejector is always granted, unless the tenant, in due time, (that is, within the time allowed for his appearance,) enters into the common rule to confess lease, &c. But if the tenant, or his landlord, wishes to defend the action, he must within that time, constitute an attorney, who will make out the common rule, and leave it, with the general issue, at a judge's chamber in the *King's Bench*, or at the prothonotary's office in the *Common Pleas*. This rule is in substance the same in both courts; and the purport of it is, that the tenant, or other defendant, shall immediately appear, receive a declaration, and plead not guilty, in a plea of trespass and ejectment for the

tenc-

tenements in question; and that, upon the trial of the issue, he shall confess lease entry and ouster, *and insist upon the TITLE ONLY*. The effect of this rule being, to bring the matter to the mere question of the plaintiff's possessory title.

[It was formerly holden, that the confession of lease, entry, and ouster, was not a confession of any entry sufficient to make out the plaintiff's title, where an entry was necessary thereunto; as where an entry was necessary to avoid a fine, or to take advantage of a condition broken. And, in the case of an ejectment brought by one tenant in common against his fellow, the plaintiff was, notwithstanding the rule, put to the proof of an actual ouster. But now, though there must be an ACTUAL entry to AVOID A FINE, and the action upon that entry must be commenced within a year afterwards, yet in the other two, and in all other cases, the confession of lease entry and ouster is deemed sufficient. Even formerly, lord chief justice Hale, allowed the confession of entry to be evidence of an actual entry, till the contrary appeared. That however was in the case of an entry under a lease, by which the plaintiff claimed title, and not in the case of an ejectment delivered within the time prescribed by the statute.

Salk. 246.
Ld. Raym.
751.
7 Mod. 39.

3 Burr. 1897.

4 & 5 Ann.
c. 16. s. 16.
Ld. Raym.
750.
Burr. ubi
a.
d. 223.

statute. This determination of *Hale*, baron *Gilbert* very strenuously opposes; for he says, that "this practice is now totally disallowed, and that an actual entry must be proved, where it is necessary to complete the plaintiff's title." Because the defendant is compellable by the court to confess lease, entry, and ouster; and therefore to make that a proof of an actual entry, which was extorted from the defendant, and upon that presumption to turn the defendant to prove the contrary, were to compel him to the proof of a negative, which in all cases is difficult and in some impossible. Besides, the words of the rule are, that the defendant shall confess lease, &c. and insist "*super titulum tantum*," the intention of the court being that the tenant in possession should insist upon every thing, that was necessary for the defence of his own title; (and such is the denial of the plaintiff's entry in establishing his) and therefore, it is a point that by the rule he may insist on, notwithstanding such confession. He then proceeds in the argument, with the following case.

If *A.* let to *B.* and *B.* to *C.* to try the title, the confession of lease, &c. extends only to the lease made to *C.* and not to that made

1 Vent. 248.

3 Keb. 218.

made to *B*; because the confession, by the rule, extends only to the lease made to try the title, and not to the lease which is PART of the title of the lessor of the plaintiff. And *Hale* admitted this, when he ruled the entry to be confessed by the formal confession of lease, &c. For though he thought that where an entry was confessed, and a lease, as though it had been made upon the land, that thereby a claim was confessed to the fee-simple of the land itself; (for a confession of entry to let, he understood to be a confession of a claim of the fee-simple; because otherwise, there could be no power to demise, which is confessed by the rule;) yet notwithstanding in this case, the lease to try the title, being a distinct lease from that by which the lessor of the plaintiff claimed, he held that it must be proved. Lord chief justice *Hale*, (continues *Gilbert*) when he held that the entry was sufficiently confessed by the rule, said, that otherwise an entry would be necessary to be proved on every disseizin. And indeed before the new rule, an entry was necessary, in order to give the plaintiff power to make a lease. Afterwards it was otherwise, because an entry does not make part of the plaintiff's title, where the lessor of the plaintiff

is disseized, for he had a compleat title before the disseizin, which was an injury done to him, for which he might have recovered damages in an assize from the first act of disseizin. And the design of the new rule in ejectment was, without the formal preparation of an entry and lease, to bring the cause to as sudden a trial, and in as short a method, as had been formerly used in an assize.]

If a man enter and deliver a declaration on behalf of the lessor of the plaintiff, this is no entry to avoid a fine, unless an express authority be given to enter for that purpose; because the entry must be pursuant to the intention: and that was, to deliver a declaration, in order to try the plaintiff's title, and not to make any title to the lessor of the plaintiff. [But if a man enter on the premises, on behalf of the lessor of the plaintiff though without any previous authority for that purpose, and the lessor afterwards assent to such entry before the day of the demise in the declaration, such assent will be adequate to an actual entry.]

1 Ventr. 42.

1 Saund. 319.

1 Mod. 10.

2 Keb. 555.

2 Str. 1128.

The common rule being made by assent of both parties, an attachment lies for the non-performance of it, as of all other rules of court, that are disobeyed;

Salk. 259.

and this is all the remedy, which the parties on both sides have for their costs.

If there be several persons who claim title, the rule may be drawn either generally, or specially: generally, as that *J. H.* who claims title to the premises in question, IN HIS POSSESSION, be admitted defendant for those premises. This puts a necessity on the plaintiff, to distinguish, by proof at the assizes, what tenements are in each defendants possession; because, by the rule, he is only to confess for the premises in his own possession: and if the plaintiff cannot distinguish, by proof, what tenements are in each defendant's possession, he can have no verdict, and consequently no judgment. Or, the rule may be drawn specially; as that *J. H.* who claims title to such and such premises, (expressing them particularly,) be admitted defendant; and this supercedes the necessity of proof, that the premises are in his possession.

Reg. Trin.
15 Car. 2. B.
R. 1 Keb.
677. Lil. Pr.
Reg. 497.

If the tenant enters into the common rule, for so much of the premises as are in his possession, his attorney must, by rule of court *immediately* deliver to the plaintiff's attorney, a note in writing thereof; and if the defendant's attorney will not give a note of the particulars of the land for

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for which he was admitted defendant, the plaintiff may summon him before a judge, who will order the rule thus specially to be drawn up, in case the party in possession will admit himself to be defendant. But because the defendant's attorney is to draw up the rule, it being entred into by his consent, it is often drawn up in general terms, which puts the plaintiff to proof at the assizes. It is true that the rule for judgment against the casual ejector is drawn up by the plaintiff's attorney, yet that is only for judgment against such ejector, in case the tenant in possession do not enter into the common rule by a limited time; which puts it upon the defendant to draw up the common rule, and leave it at a judge's chambers in the King's Bench, or at the prothonotary's office in the Common Pleas, and to give notice of it to the plaintiff's attorney, that he may proceed.

Lil. Pr. Reg.
499.
8 Mod. 118.

The rule is, that the tenant shall immediately appear and receive a declaration, which supercedes the necessity of an original writ in the Common Pleas; because the tenant is to appear and receive a declaration, and therefore cannot take any advantage for want of an original, unless in a writ of *error*: but when a writ of *error* is brought, the plaintiff

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must

18 Eliz. c.
14.

must file an original, unless it be after verdict, when it is helped by statute.

And as in the *Common Pleas* there is no need of an original, so in the *King's Bench* there is no need of a latitat, or bill of ejectment; but the party must file *BAIL* before he can proceed. He must also file a bill of ejectment, besides the plea-roll, in case a writ of error be brought, before errors are assigned: the reason is, that the court has no authority to proceed in ejectment by bill, unless the defendant be in custody; and therefore by the rule, bail is ordered to be filed, that the court may have authority to proceed. They do not however file a bill in the office against such person as a prisoner of the court, suggesting that he is delivered to bail, because he is bound by the rule to receive a declaration, and so they need only make up the plea-roll, until a writ of error be brought; though they must file their bill of ejectment; because in the writ of error no notice is taken of the rule, and therefore a bill must be filed against the person, as a prisoner of the court, that a proper person may appear to the superior jurisdiction, and a proper suit be commenced against him.

Yet.

Yet in the *King's Bench* they may proceed by original, as well as by bill; because in like manner as they may proceed against any person privileged or bailed by the court, so also may they proceed by original in this court; (because it is an action of trespass, which is originally cognizable by the court, it being a criminal cause, for which there was formerly a fine due to the king,) and then there is a declaration delivered as in the *Common Pleas*.

And there is this benefit in proceeding by original in the *King's Bench*, that no writ of error lies but in parliament, and the writ of error cannot be allowed but in the interval of parliament. The reason is, because no writ of error lay out of the court in which the king was supposed to preside in person, but to the legislature; and the king was supposed to preside in the court where criminal offences were punished, because it was part of his high office to preserve the public peace by animadversion on criminal offences. But when the court of *King's Bench* had acquired a jurisdiction in civil causes, by way of privilege, relating to the prisoners of their own court, it became necessary, that the subject should not be disappointed of his writ of error, either by the not sitting of

parliament, or by its being employed in public business when it did sit; and therefore the statute of the 27 *Eliz. c. 8.* gave a writ of error in the *Exchequer Chamber* in civil actions, among which are ejectments; but it excepts the case WHERE THE KING IS PARTY. [And the king (says *Gilbert*) "is "supposed to be party, in all actions which "punish trespasses in a criminal manner, as "the ejectment is when it commences by "original writ, returnable in the *King's Bench*; and therefore there lies no writ of "error but in parliament on a judgment "given *in banco Regis* upon an original."

This reason, however, of *Gilbert*, why a writ of error does not lie in the *Exchequer Chamber*, on a judgment in ejectment by original writ in the *King's Bench*, is not by any mean conclusive. The true, and indeed the only reason, for a distinction in this case, proceeds from the act of *Elizabeth*, which gives the appeal, by writ of error, to the *Exchequer Chamber*, in such actions only as are FIRST commenced in the *King's Bench*: and therefore it is, that though a writ of error will lie in the *Exchequer Chamber*, on a judgment in ejectment by BILL, which originates in the *King's Bench*; yet it is otherwise, where the ejectment is commenced by ORIGINAL WRIT,

for that issues out of *Chancery*, where the action in that case is *first commenced*.

Formerly, the court published a rule, that they would not permit any person to take judgment against the casual ejector without a certificate that a latitat had been taken out, and bail filed; because the court had no authority to proceed without the defendant appeared to be a prisoner of the court, unless by way of original. But now such motion is granted without a certificate; and it is sufficient if bail be filed for the casual ejector, after the rule for judgment be drawn up. Bail however must be filed for the casual ejector, before you can oblige the tenant in possession to accept the declaration, since there is no cause in court against the casual ejector, in whose place the tenant in possession comes, till bail be filed against him; and therefore he is not obliged to accept a declaration, or to confess lease entry and ouster at the assizes, till bail be filed. And if no such bail be filed for the casual ejector, and the plaintiff goes to trial against the tenant in possession, the court will set aside any judgment given against the casual ejector.

But where no bail was filed in ejectment, and a writ of error was brought, and it appeared by the attorney's books,

Reg. Trin.
14 Car. 2.
Mich. 33
Car. 2.
B. R.

2 Show. 249.

that the attorney had his fee to file bail, but was since dead, the court ordered bail to be filed *nunc pro tunc*, that no error might appear upon the record, because as it was on the part of the defendant to file bail, therefore he should not be allowed to take advantage of his own error: and though the plaintiff proceeded without any bail filed by the defendant, yet since the defendant's attorney had his fee to file such bail, and as there was no proper remedy against the defendant, because he had given the fee, nor against the attorney, because he was dead; therefore it became the justice of the court to set it right, that the plaintiff might have no mischief.

But there is now no necessity for a *latitat*, because when the casual ejector files common bail he admits himself to be a prisoner of the court; for his being admitted out to bail, implies that he was once a prisoner: and whether he came into court regularly by *latitat*, or not, yet the judgment is not *coram non judice*. For instance, if the casual ejector accept a declaration, pleads, and judgment be given against him, the same is recorded; and it appears thereby, that he has taken a declaration, as a privileged person. So if
the

the tenant in possession make himself defendant, and accepts a declaration, he must file common bail according to the rule: but there is no need of a *latitat*, because the *latitat* is no part of the record; since, by filing common bail, he acknowledges himself to be a privileged person, and then the suit has as good a commencement as though it were by bill.

Next of the DECLARATION in ejectment; and *first*, of laying the demise, entry, and ouster.

The demise must be laid on some day after the commencement of the lessor's title; for the question always is, whether the lessor could then make the lease: and therefore, where an entry is necessary to compleat his title, as to avoid a fine, the demise must be laid on a day subsequent to the entry. But it is usual to lay the demise as far back as possible; for then the judgment in ejectment will be conclusive evidence for the plaintiff, in an action for the mesne profits. Str. 1087.

The demise should also be laid on some day before the delivery of the declaration; but if a man delivers a declaration against the casual ejector, as of *Easter* term, which must be delivered before the effoin day of *Trinity* term, and the plaintiff's title arises Lil. Fr. Reg. 503.

after *Easter* term,—if the tenant in possession comes in and accepts a declaration, it must be of *Trinity* term, and then the plaintiff will be able to shew a good title on that declaration of *Trinity* term, which will be after his title accrued; for the declaration which was of *Easter* term, being against the casual ejector, is perfectly out of the case, because the defendant proceeds to issue upon a declaration of *Trinity* term, which is after the plaintiff's title accrued; and if the defendant will not proceed to issue, and confess lease, &c. he has no remedy; for the plaintiff can take his judgment, upon the declaration against the casual ejector, to which the defendant is not a party.

Cro. Jac.
613.

Ld. Raym.
136.
Carth. 390.

It was formerly holden that where an ejectment was brought for TITHES, the plaintiff must have declared on a demise by deed; because *tithes* cannot pass without deed. But where an ejectment was brought on a demise by a corporation, the court adjudged that the plaintiff need not declare on a demise by deed; because ejectments at this day are grounded on fiction: and *Holt* chief justice denied the former case to be law.

Where

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Where the title is in several persons, who are severally concerned in interest, it is usual to declare upon several demises; and therefore, when a term is limited to trustees, for securing the payment of an annuity, or portions, &c. though the trustees seldom act, yet it is usual to declare upon their demise, and also upon the demise of the *cestuy que trust*.

The plaintiff in ejectment declared upon two demises, of several lands, by several parties, but laid only one *habendum*, viz. *habendum tenementa prædicta*, so demised by the aforesaid several parties, for seven years; and it was assigned for error, that the declaration was ill for want of an other *habendum*, for that the verdict is general, and it is uncertain to which demise this single *habendum* relates. The court held that, *reddendo singula singulis*, it was well enough.

Carth 224.
2 Vent. 214.
Comb. 190.
Ld. Raym.
561.

Another rule is, that though the plaintiff by the new method is not obliged to make an actual entry, or a real lease, yet he must lay the commencement of the supposed lease in his declaration, preceding the ouster and ejectment by the defendant; because the wrong complained of by the plaintiff is that the defendant entered upon his possession, which he hath title

to by virtue of the demise mentioned in the declaration: and therefore if the ejectment and ouster should be laid before the commencement of the lease, though such ouster be wrong, yet the plaintiff ought not to complain of it; because it was no wrong to him, inasmuch as, by his own shewing, it was done before his title commenced.

Yelv. 182.

Thus where the plaintiff declared on a lease, made the 27th of *April anno primo regis*, and laid the ouster by the defendant on the 26th of *April anno primo prædicto*, this was held bad; because it was plain that the plaintiff had no title till the 27th, and therefore that the ouster on the 26th was no trespass to him.

1 Sid. 8.
3 Mod. 198.
Comb. 83.
Cro. Jac.
258.

So if the lease had been made the 27th of *April, habendum a dicta 27th April, or, a die datus, virtute cujus* the plaintiff entered, and was possessed till the defendant *postea, eodem 27 die Aprilis*, did eject him; this would have been bad: because the ejectment was before the plaintiff's title commenced, for the lease did not commence till the 28th of *April*. — But if the lease be made on the 27th, *habendum* from thenceforth, or from the sealing and delivery, or from the date, there the ejectment may be laid on the 27th, because the lease com-

5 Co. 1.
Co. Lit. 46.
b.
4 Leon. 144.
Cro. Jac.
135, 258.

mence

mences on the 27th, and an ejectment may be on the same day, on which the plaintiff's title commences.

~~This distinction, however, between the date and the day of the date, was lately abolished by the court of King's Bench, who very justly determined, after great deliberation, that both these expressions should be construed indifferently, either inclusively or exclusively, so as to give effect to the deed in which they are used. Therefore it should seem that, at this day, the former of the two last cases is not law; and that, if it were to be decided again, it would meet the same decision with the latter.~~

Pugh v. Duke of Leeds
Mich. 18 G.
3. B. R. *714, 1*
6012

But the law does not necessarily oblige the plaintiff expressly to mention the day of the ouster, so that it appear to be after the term commenced, and before the action brought; and therefore where the declaration was on a demise, the 25th of *March primo regis*, for three years; by virtue whereof the plaintiff entered, and was possessed until the defendant *postea*, viz. *anno supra dicto* entered and ejected him, without specifying the day of the ejectment, this was held good on error; for the action being commenced *secundo regis*, and the ejectment laid to be *primo*, it was plain from the declaration, that the ouster and eject-

Cro. Jac.
312.

ment

ment were after the plaintiff's title commenced, and before the action brought.

2 Rol. Rep.
466.
but see
Cro. El. 766.
contra.

Neither is the plaintiff, as it seems, necessarily obliged to alledge the particular day of his entry in the declaration; and therefore where the plaintiff declared on a lease to commence at a future day, *virtute cuius* he entered, and was possessed till ejected by the defendant, this was held good on a writ of error; because it is said that he entered by virtue of the lease, which could not be before it commenced; for he could not enter by *virtue* of the lease till the lease commenced. It would have been otherwise if the declaration had been *pre-textu cuius* he entered, for the plaintiff might enter unlawfully, or before his time, under *pretence* of the lease.

Jenk. 341.
Cro. Jac.
311.

The plaintiff declares, in ejectment in the *Common Pleas*, and after an imparlance, as the course of the court is, makes the second declaration; if in such case the plaintiff, by the first declaration, should lay the ejectment and ouster before the commencement of his term, or omit any matter of substance, though the second declaration were right, and the ouster were laid after his term commenced, yet the plaintiff shall not recover; because the declaration on the imparlance-rol is the material one

on

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on which the action is grounded, and must be supported by it, and the plea-roll is but a recital of the other, and therefore ought to begin with an *alias prout patet, &c.*

And though the declaration in law relates to the first day of the term, because the term is in law considered as one day, yet the plaintiff may declare on a lease made some time after the first day of the term, and may recover thereon. It must however appear to the court, that the declaration was filed after the day of the commencement of the supposed lease, for otherwise the plaintiff complains of an ejectment before he had title. And if the time of filing a bill were not examinable, the act of law, which makes the relation to the first day of the term, would be an act of injury to the plaintiff, and a delay to his right; for then a man ejected out of a lease made in term time, could not complain till the term was over.

The plaintiff declared on a lease made the 6th of May, Anno 7^o and was thereby possessed *quousque* the defendant *postea*, on the 18th *eiusdem mensis, anno sexto supradicto*, ejected him; and it was objected, in arrest of judgment, that the ejectment was laid to be a year before the commencement of the

2 Rol. Rep.
153.

2 Vent. 174.
1 Sid. 432.
Carth. 288.

Yelv. 182.
Cro. Jac. 154.
But see
Carth. 401.

the lease: but the declaration was allowed to be good; because the ejectment was laid to be on the 18th *eiusdem mensis*, which could not be if it were done in the sixth year; and therefore the court rejected the word *sexto*, as inconsistent and void.

Cro. Jac.
96.

In another case, which is much stronger than the former, where the plaintiff declared on a lease made the sixth of September 2 Jac. and that he was possessed, until the defendant *postea, scilicet* on the fourth of September 2 Jac. ejected him, the declaration was holden good, and the words under the *scilicet* were rejected as surplusage. This case was afterwards recognized in another equally strong, which was an action of trover, where the conversion was laid, under a *scilicet*, before the trover, and the court adjudged the *scilicet* to be void.

Ibid. 428.

Cro. Jac.
662.

So where the declaration was of a lease of the 22d of May, *habendum a primo die Maii* for three years; *virtute cuius* the plaintiff entered and was possessed, *quousque postea, viz. eisdem die & anno* the defendant ejected him, this, on a writ of error, was allowed to be a good declaration; though it was insisted, that *eisdem die & anno* must refer to the first day of May, which was the last antecedent, and then the ejectment

ejectment was laid to be twenty-one days before the lease was made: because, the lease being made the 22d of May, and it being stated that the plaintiff afterwards entered by virtue thereof, the ejectment *eisdem die et anno* must refer to the day when the lease was made, or there could be no ejectment of the plaintiff. And in matter of right, where there doth not appear a direct contradiction, the judges follow the reason of the thing, rather than adhere to a rigid grammatical construction of the words of a declaration.

Salk. 325.

The plaintiff in ejectment declared, that J. S. by indenture dated the 9th of June, without saying when it was made or delivered, did demise, &c. *habendum a die datus sigillationis & deliberationis indenture predictæ; virtute cujus* the plaintiff entered and was possessed, till the defendant, the same day ousted him. It was moved in arrest of judgment, that it was uncertain by the declaration when the term began, neither the day of the date, nor of the sealing and delivery being mentioned in the declaration: yet judgment was given for the plaintiff, because after a verdict it shall be intended not only to bear date, but also to have been sealed and delivered on the

Cro. El. 606

773. 324. Lidl

Hetl. 63.

the day mentioned in the declaration, which was the 9th of *June*; for all deeds are presumed to be delivered on the day they bear date, till the contrary appear.

But where the limitation in the lease is altogether uncertain, the plaintiff cannot recover; because where the commencement of the lease is uncertain, the lease is void in itself, and then the plaintiff cannot have a title. Besides, the court cannot possibly perceive, whether the ejectment was before or after the plaintiff's title accrued, if such an uncertain lease could give him one.

1 Ventr. 137.

Otherwise it is where the limitation or commencement is impossible; for in such case the lease commences from the delivery, as if it had no date, and then the court may judge whether the ejectment be laid before or after the commencement. And there is this further reason for the difference, that the impossible limitation is rejected, because it could not be part of the agreement or contract; but an uncertain limitation is part of the contract, though it vitiates the whole agreement, because the court cannot reduce it to any certainty.

1 Mod. 180.

Hetl. 63.

Thus where the plaintiff declared on a lease *habendum a die datus indentura predicta*, without mentioning an indenture before, this

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1697

this was held bad, for the uncertainty when the lease commenced.

But if the plaintiff had declared on a demise to him *per quoddam scriptum obligatorium habendum a die datæ indenturæ prædictæ* this had been good; because *scriptum obligatorium* shall be intended an indenture.

1 Vent. 137.
2 Keb. 796.

The plaintiff declared on a lease of the fourth part of a house, in four parts to be divided; by force of which he entered in *tenementa prædictæ*, and was possessed, till the defendant ejected him *de tenementis prædictis*: It was objected in error, that the plaintiff had laid the ouster to be of more than, by his lease, he had a title to; for the ouster was *de tenementis prædictis*, which at least must be understood of the whole house; and the lease was only of the fourth part: but the objection was over-ruled, because *de tenementis prædictis* shall be intended only of the fourth part of which the lease was made; besides, it was but just he should recover as much as he had title to, though he had laid his ejectment for more.

Cro. El. 286.

The plaintiff declared on a demise made the 16th day of *January*, by an indenture dated the 2d day of *January*, without saying *primo deliberat* the 16th; yet the declaration was held good: for though all inden-

Cro. El. 890.

H

tures

tures shall be presumed to be delivered on the day they bear date, unless the contrary be shewn; and therefore this lease must commence the 2d day of *January*, which, if true, would be a different lease from what the plaintiff declared on; yet because the plaintiff hath declared on a demise the 16th, it must necessarily be intended that the indenture was delivered on the 16th, because it cannot possibly be a demise before the delivery; and therefore the delivery must necessarily be intended to have been on the day when the demise is said to have been made, and not the day of the date of the indenture.

Cro. El. 773.

2 Leo. 117.

3 Leo. 266.

But where the plaintiff does not make mention of any particular day when the demise was made, but only in general says, that *J. S.* by his indenture bearing date the first of *January* did demise to him, so that it doth not appear by the plaintiff's own shewing when the lease commenced; the law in such cases construes the delivery to have been on the day it bears date; and so the declaration was held to be good, and not void for the uncertainty of the commencement of the lease, as was objected.

Though by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule, and by that means the

the mischief of any variance, between the lease declared on and the lease produced and proved on the trial, is avoided,—which was a danger the plaintiff was exposed to, and often miscarried in, by the old method of proceeding;—yet in the modern practice the plaintiff must take care to declare on such a lease as suits with his lessee's title; and therefore if there be several lessors, and you lay the declaration *quod demiserunt*, you must shew in them such a title that they might demise the whole; for the word *demiserunt* must be taken in pleading according to the legal sense it bears. So that if any of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them, for it is only a confirmation, where he is not concerned in interest; and therefore the confession of this joint lease doth not help, because you do not confess the title, by the rule.

Cro. Jac.
166. 1

So where the plaintiff declared on a lease made by *A.* and *B.* and it appeared on the trial that *A.* was tenant for life, remainder to *B.* in fee, this, on a special verdict, was adjudged against the plaintiff: because it could not be the lease both of *A.* and *B.* to pass the land *in presenti* to the plaintiff; for during the life of *A.* it could only be his lease, because he was the tenant in pos-

Co. Lit. 45.
a.
6 Co. 14. b.
Poph. 37.

session; and *B.*'s joining in the lease amounted only to a confirmation, but could pass no interest during the life of *A.*: and therefore the allegation of the plaintiff, that *A.* and *B.* did demise, was not proved.

¹ Show. Rep.

342.

² Will. 232.

If the plaintiff declare on a lease made by *A.* and *B.* and on the trial it appears that they are tenants in common, the plaintiff cannot recover; but if *A.* and *B.* had been joint tenants, a joint lease to the plaintiff had been good; and he might have declared *quod demiserunt*. The reason of the difference is, that tenants in common are in of several titles, and therefore the freehold is several, and if they be disseised, they shall be put to their several actions; therefore, as the lands of tenants in common are to be considered as different estates depending upon different titles, the plaintiff shall not recover on their joint lease; because that were to allow the plaintiff to try two several and different titles, in one issue, at the same time. Besides the plaintiff, to make out his title, must prove that each demised the whole to him, or else he doth not prove the declaration; and the discovery of the tenancy in common proves the contrary; for as they have different titles to a moiety only, so they could not each of them demise the whole.

But

But joint tenants are seised *per my & per tout* and derive by one and the same title; and therefore each may be said to demise the whole; and as they must join in an action for any violation of their possession, so their lessee shall recover on their joint demise. And coparceners seem to stand on the same foundation and reason; because both coming in as one heir, the possession must be joint, as that of joint-tenants. But in the case of *Milliner and Moor* 682. *Robinson*, it was allowed a good exception to the declaration, that the plaintiff declared that two coparceners *demiserunt*; and therefore, to avoid any difficulty in those cases, the best way is for coparceners, joint-tenants, and tenants in common, to join in a lease to a third person, and for that lessee to make a lease to try the title.

A lease made by a guardian to try the title of an infant seems good; for though such lease may be voidable as to the infant yet a stranger cannot defeat it: and if the lessee should not be allowed to maintain his ejectment on such lease, the infancy would deprive the minor of that remedy of punishing the trespasser, which persons of full age are intitled to; which were to deny a minor the common right and privilege of other subjects.

Hard 330.
Owen 18.

2 Co. 61.
Cro. El. 438,
481.
Cro. Jac.
332.

A man may bring an ejectment on a joint lease made by baron and feme of the lands of the wife, if the lease be made by herself in person, whether it be by parol or indenture; for the contracts of the wife, relating to her own estate, are but voidable during the coverture, that she may have the benefit of them after the death of her husband, if it shall be for her interest to confirm them: but the husband ought to join in such lease, for the husband and wife are considered in law as one person; and as the former has an interest during coverture, in the property of the latter, the whole proprietor would not join in the lease, without the husband: and on such joint-lease each may be said to demise the whole, and the lessee may maintain his ejectment on such demise. But it is not necessary that the husband and wife should join in a lease, to try the title to the wife's estate; for the husband alone may make a lease for that purpose, because during the coverture he hath power over her property, and therefore all his contracts relating to it are good during his life; for his pleasure must determine her who hath resigned her will to him: but after his death she may avoid the lease.

Cro. Jac.
617.

Cro. Jac.
322.

If

If the plaintiff declare on a joint-lease by baron and feme, and the lease appears in evidence, to have been executed by a third person, by virtue of a letter of attorney from the husband and wife, such evidence will not maintain the declaration; because she cannot delegate a third person, to act for her, who hath already devolved all power and authority on her husband. But though the letter of attorney is void as to the wife, yet it remains good as to the husband; hence it hath been held, that the lessee may in this case declare as on the lease of the husband only.

Yelv. 1.
2 Brownl.
248.

A copyholder may declare upon a lease for any number of years without forfeiture: and that the lessee of a copyholder, for a year, may have an ejectment, there is no question; for his estate is warranted by the law of the land, and it is the most speedy way for him to recover the possession.

Cro. Jac.
617.

Secondly, Of amending the declaration.

If the cause be adjourned for difficulty into the *Exchequer Chamber*, since the court itself delays the plaintiff, they will upon a rule delivered to the defendant to shew cause to the contrary, enlarge the term, unless the defendant can shew very good cause to the contrary; because the defendant having entered into a rule to confess a

Cro. El. 469.
535.
Owen 18.
Latch 199.
Hardr. 330.
Lutw. 803.
Co. Lit. 398.
a.
4 Co. 26. a.

Carth 3.
Comb. 15.
50.

lease, without mentioning the term, it must be understood to be such a lease as is adapted for the trial of the plaintiff's title, especially, since the defendant, by coming into the room of the casual ejector, had delayed the plaintiff from getting the possession; for though it may be said to be the plaintiff's fault for not delivering a declaration of a term large enough, whereon to get judgment; yet since the defendant delays him by the permission of the court, it is not fit that the original shortness of the term should turn to his prejudice.

Salk. 257.
Comb. 110.

6 Mod. 130.

But this case is said in *Salkeld* to have been done by consent of parties, that is, that the court would not take farther time to adjourn, and deliberate where the term was near spent, unless the parties would consent to enlarge it. Even where the parties were hung up by an injunction from the court of *Chancery*, the court refused to enlarge the term without the consent of the parties, because that would be to erase and alter the record of the plaintiff's declaration, which they will not do without consent.

Str. 1272.

1 Sid. 24.

However, it appears that in a subsequent case, the term was enlarged without consent, from five to ten years. And the court hath changed the plaintiff in ejectment after the declaration delivered; and

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and hath enlarged the term, where the cause hath been long in agitation; and judgment hath been entered against the plaintiff after his death. 5 Mod. 33. 1 Mod. 252.

At present, the general rule of amending declarations in ejectment seems to be, that no such declaration can be amended *before* appearance; nor *afterwards*, except in matter of *form*. And in a modern case the demise was held to be mere matter of form. Barnes 4to edit. 186. 4 Burr. 2449.

VII. *The plea and general issue.*

The general rule in the issue in this action is, that whatsoever bars the right of entry, is a bar to the plaintiff's title; therefore the plaintiff must prove seisin, within twenty years, in himself or his ancestors; or he must prove seisin, in a third person, of a particular estate in the land, and that he claimed within twenty years after the reversion accrued; or that he was an infant, feme covert, *non compos*, imprisoned, or beyond the sea, at the time when the title accrued, and that he claimed within twenty years after he came of age, &c. hence 1 Burr. 119. it is, that the defendant need not plead the statute of limitations, as in other actions.

A fine and nonclaim, or a *discent* *cast*, which take away the entry, are good pleas in this action, in bar of the plaintiff's right of entry.

So

9 Co. 77. 8.

5 Co. 105.

2 Burr. 1046.

but see 2

Ld. Raym.

1418.

So an accord with satisfaction is a good plea in ejectment; for it is an action of trespass in its nature.

Ancient demesne is likewise a good plea in ejectment; but leave must be had of the court to plead it: and the affidavit, to obtain such leave, must shew that the lands are holden of a manor, which manor is ancient demesne.

Carth. 18c.

These pleas indeed are now seldom pleaded; for, according to the modern practice in ejectment, the defendant, if he appear, is generally bound by the consent rule, to plead the general issue of not guilty. But as this rule was introduced to answer the purposes of justice, it is sometimes departed from for similar purposes; and therefore, where an ejectment was intended to try the right to a rectory, the defendant was admitted to plead that he himself was rector, and to traverse the rectorship of the plaintiff's lessor, in order by that mean, to bring the right in question. For the most part however, the defendant can only plead the general issue; which is therefore usually left with the consent rule, at the judge's chambers or the prothonotary's office: but if it be not so left, the plaintiff must give a rule to plead; and then, judgment may be entered for want of a plea as in other actions,

Reg. Hil.

1649. and

Trin. 18 Car.

2. B. R.

actions, without a special motion in court by council.

An attorney of the court was, with another, made nominal plaintiff in ejectment; and the court would not grant an imparlance to the defendant, because the attorney claimed his privilege to be answered the same term, on account of his being always resident in court: but this way of hastening the cause is now disused, since the delivery of a declaration to the casual ejector, before the term, forces the defendant to issue the same term, which is equally expeditious.

In making up the issue, the first declaration must not be varied from, except in the defendant's name.

Sty. Rep.
367.

Ld. Raym.
1411.

VIII. *The verdict, evidence, and new trial.*

Next follows the *verdict*; but first it is observable, that if the plaintiff, after issue and before trial, enter into part, the defendant may at the assizes plead this as a plea *puis darrein continuance* in bar to the plaintiff's action; but it is at the discretion of the judges, whether they will receive it or not—though if they do, it stops the trial; and the plaintiff cannot reply to it at the assizes, but the judge is to return it as part of the record of *nisi prius*.

Yelv. 180.
Cro. Car.
261.

If

Salk. 259.

If the defendant will not appear at the trial, and confess lease, entry, and ouster, according to the rule, the practice is to call the defendant and his attorney, if he be within the rule, and on his non-appearance or refusal to comply with the rule, to call the plaintiff and nonsuit him; then, at the plaintiff's instance, the cause of the nonsuit is endorsed on the *possea*, which intitles the plaintiff to judgment against the casual ejector, when the *possea* is returned into court.

Ld. Raym.
729.
Barnes 4th
edit. 149,
174.

But where there are several defendants for the same premises, and some of them appear and confess lease, entry, and ouster, but others are disobedient to the rule and refuse to appear, the practice is to proceed against those who do appear, and to enter a verdict for the rest; but then the cause of that verdict is endorsed on the *possea*, which, as to them, intitles the plaintiff to judgment, against the casual ejector.

1 Vent. 355.

It was formerly holden, that if some of the defendants did not appear, the plaintiff could not proceed against the others who did, but that, in such case, he must have been nonsuited as to all of them; because all the defendants not admitting the demise, and the plaintiff not proving an actual entry and demise, he could not maintain his declaration;

claration: but if there appeared to be any covin between the person not appearing and the lessor of the plaintiff, the court would stop the judgment against the casual ejector for the part of him who appeared; because a declaration was delivered to each of the defendants for his respective part, and therefore where one of them did not pay obedience to the rule, the plaintiff had judgment against the casual ejector for his part only. This practice, however, was soon discontinued; and another succeeded, by which the plaintiff was permitted to proceed against those who appeared: but then, if he were nonsuited on the trial, all the defendants were intitled to costs, which any one of them might release to the plaintiff. This latter practice, though much more reasonable than the former, was pregnant with the mischief before alluded to, of making a person defendant, with others, who was not concerned in the possession, in order to save the costs; it was therefore very justly abolished, and the modern practice introduced, in the reign of *William* the third.

2 Ventr. 195.

Ld. Raym. 729.

The plaintiff declared of an ejectment of one hundred acres of land, and in evidence shewed a lease of forty acres only: upon this it was objected that the lease did not

Cro. El. 14.

not support the count; but it was ruled that the ejectment was well brought for so much as was comprised in the lease, and that for the residue the jury might find the defendant not guilty.

1 Sid. 239.

So where the declaration in ejectment was of the fourth part of a fifth part (in five parts to be divided) and the title of the plaintiff upon the evidence was only to the third part of a fourth part of a fifth part (in five parts to be divided) which was only a third part of that which was demanded in the declaration, the court determined that the verdict might be taken according to the title.

1 Burr. 330.

And in a modern case, where the declaration was for a *moiety* and the verdict for a third part, the plaintiff had judgment according to the verdict; for if more is laid, there is no reason why he should not recover less: though the reverse indeed will not hold; *viz.* that if he demand less, he shall nevertheless be intitled to recover more.

Yelv. 114.

But it hath been holden, that if an ejectment be brought for an acre of land, and the metes and bounds are described on all sides in the declaration, and the jury find the defendant guilty in half an acre of the land, this is a bad verdict, because of the uncertainty,

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of which part or moiety the plaintiff shall have execution; but if it had been in an action of trespass, the verdict had been good; because, as damages only are recoverable in that action, a trespass proved in any part of the acre would have been sufficient.

So where the plaintiff in ejectment declared upon the lease of an house, ten acres of land, twenty acres of meadow, and twenty acres of pasture, by the name of an house and ten acres of meadow, be the same more or less, and had a verdict, the judgment thereupon was arrested: for the declaration was so repugnant and uncertain that even the verdict could not help it; because the land mentioned in the declaration is of a different nature from that mentioned in the *per nomen*: besides, the number of acres is so different, that the words *more or less* cannot reduce it to any certainty, for it were unreasonable to extend them to twenty acres more than was mentioned in the *per nomen*.

Yelv. 166.

1 Brownl.

145.

Owen 133.

Upon a special verdict in ejectment, it ought to appear that the lessor of the plaintiff might enter, at the time when he brought the ejectment.

1 Burr. 119.

Next in order to be treated of is the NEW TRIAL, which is grantable by the court

court, where the jury give their verdict contrary to evidence, and in other cases. Here, however, it may not be amiss to consider the nature of that evidence, I mean as to some particular cases only, which should be adduced to a jury at *nisi prius*. But first, it should be observed upon the channel of evidence, that a co-defendant cannot be admitted as a witness, either for, or against the plaintiff; and therefore if a *material* witness against the plaintiff be a *nominal* co-defendant, he should suffer judgment to pass against him by default, which will effectually restore his testimony. For if he plead, and by that mean admit himself to be tenant in possession, the court will not afterwards strike out his name, on motion; though in such case, if he consent that a verdict be given against him for the premisses in his own possession, there can be no reason why he should not be a witness for another defendant.

Rule = Dormer v.
let 9th Fortescue,
v. Co. Mich. 9 G. 3.

1 Burr. 119.

Having premised this, I shall now proceed to the rules of evidence. And first, as ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter, it is always necessary for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, in the lessor of the plaintiff or his ancestors; or by accounting for

for the want of it, under some of the exceptions allowed by the statute of limitations. But a lease under a power, in prejudice of those in remainder, is not sufficient evidence of possession; for a surrender of such lease might and ought to be presumed at the trial, to let in the statute.

1 Burr. 126.

So it hath been holden that, in ejectment for MINES, evidence of being lord of a manor is not sufficient proof of possession; it being necessary to shew an actual possession.

Ld. Cullon *Pl. c.*
v. Rich. M. *rep.*
14 G. 2. 102, *v. c.*
B. R.

For the same reason, a verdict in trover, for lead dug out of a mine, will not prove possession of the mine; for that action may be brought by him who has the property only, without the possession.

And though the defendant confess lease, entry, and ouster, yet he may deny that he is in possession of the premises for which the plaintiff contends, and puts him to prove it; which if he cannot, he must be nonsuited. So if the landlord have been made defendant instead of his tenant, the plaintiff must prove the tenant in possession; for the defendant does not, by entering into the rule, confess himself to be landlord of any premises, but of such as were in the possession of his tenant. But these must have been cases where there were several tenants; for

1 Wils. 220.

Doe ex dm. *Pl. c.*
Jesse v. Bac-*rep.*
chus, M. 30 *v. c.*
G. 2. at the
sitting B. R.

it has been said, that if there be but one tenant a defendant, the plaintiff need not prove him in possession; because, if he be not, why did he enter into the rule?

Str. 70.

Co. Lit. 240.

Where the lessor of the plaintiff claims as DEVISEE of a term, he must prove the assent of the executor to the devise; but where he claims as devisee of a FREEHOLD, it is not necessary to prove possession; for the law casts the freehold on the devisee: and though the heir may have entered before him and died, yet that will not bar his entry.

Rol. Abr.

678.

Theo. Evid.

40.

If a man devise lands by force of the statute of WILLS, or by custom, THE PROBATE of the will in the spiritual court cannot be given in evidence; for all their proceedings, so far as they relate to lands, are *coram non judice*; inasmuch as they have no

Id. 41.

power to authenticate any devise: and therefore a copy produced under their seal, is no evidence in ejectment though it be only to prove the relation of father and son, by the father's will. For where the original is in being, the copy is no evidence, and the probate is no more than a copy, under the seal of the court. Yet to prove such a relation, the ledger-book was allowed to be evidence; because that was not considered

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744.

merely

merely as a copy, but as the rolls of the court itself. And though the law doth not allow these rolls, to prove a devise of lands, where the claim is by the words of the devise, for the reasons already given, yet when the will is only to prove a relation, the rolls of the spiritual court, which hath authority to inroll all wills, are sufficient proofs of such testament: for if there be such a testament as appears by the rolls of that court, the relation is proved.

But the copy of the ledger-book was not allowed to be read in this case; because common practice had prevailed that it should not: though *Holt* declared, that as the original would have been read as a roll of the court, without further attestation, it was fit that the copies also should be read, and that the practice should be altered. This practice seems to have been founded on a mistaken notion, that the ledger-book is read as a copy, and therefore the copy of it, is but the copy of a copy; whereas in truth it is read, as a roll of the prerogative court. And upon a similar principle, where a will remains in *Chancery*, by order of the court, a copy of it may be given in evidence; for then it becomes

Ibid.

Keb. 40. 117.

a roll of that court, and by consequence a copy of it is good evidence.

But Per Lee ch.
just. in An-
264, sty and Dow-
v. C. fing

When the will is produced, the usual way is to call but one witness to prove it; but that is only, when no objection is made by the heir: and though HE is intitled to have them all examined, yet he must produce them; for the devisee need produce only one, if that one can prove all that is requisite. And though they should all swear that the will was not duly executed, yet the devisee may go into circumstances, to prove the due execution. As was the case of *Austin and Willes*, in which, notwithstanding all the witnesses swore that the will was not duly executed, the devisee obtained a verdict.

But Cited by Ld.
Hardwicke
in Blacket
264, and Wering-
ton, M. 11
Geo. 2.
Str. 1096.
1 Lev. 25.

So much for the will and the evidence necessary to prove it. It is next to be noted that if the plaintiff make title under an assignment of a term by an administrator, and cannot produce the letters of administration, the book of the ecclesiastical court, where the order of the court for granting them was entered, is evidence; or a copy of that book will be sufficient. But the administrator shall not be permitted to give such a book, or a copy of it, in evidence, until he have proved that the administration, under the seal of the court, is lost.

Cro. Eliz.
13.

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Where the lessor claims *AS HEIR* at law of *A.* it is sufficient to prove that *A.* was in possession, and that the lessor is his heir; for it shall be intended, *prima facie*, that *A.* was seised in fee, till the contrary appear.

Where the lessor claims as tenant by *ELEGIT*, he must not only prove the judgment, and, by the judgment roll, that an *elegit* issued and was returned, but he must also prove the writ of *elegit* by a true copy thereof, and the inquisition thereon; for it is the *elegit* and the inquisition upon it, which carve out the term, and give the right of entry: the judgment roll being no more than a memorandum that the *elegit* issued and was returned. For which reason, the copy thereof is no evidence, it being but a copy of that, which is only a copy or memorandum of the thing itself. And should it appear by the inquisition, that more than a moiety has been extended, the plaintiff cannot recover the possession; for by this, the sheriff having exceeded his authority, the execution is not only voidable, but void.

Gilb. Law of
Evid. 9.

Salk. 563.
Ld. Raym.
718.

Where the lessor claims as *CONUSEE* of a statute merchant, he must prove a copy of the statute, and of the *capias si laicus*, extent, & *liberaté*, returned; for though, by the re-

Salk. 563.

turn of the extent, an interest is vested in the conusee, yet the actual possession of that interest is acquired by the *liberaté*.

1 Sid, 222.

If an ejectment be brought for a RECTORY, the plaintiff ought to prove that his lessor was admitted, instituted and inducted; that he read and subscribed the thirty-nine articles; and declared his assent to all things contained in the book of Common Prayer. Yet he need not prove a title in the patron; for institution and induction, upon the presentation of a stranger, is sufficient to bar him who has right in an ejectment, and to put the rightful patron to his *quare impedit*.

Id, 436.

1 Vent, 15,

But presentation ought to be proved; and institution will not be sufficient evidence to prove it, though it be recited in the letters of institution; especially if induction or possession have not followed. Proof however of a verbal presentation is sufficient; though it cannot be proved by him who presented, even if he were only grantee of the avoidance. Probably, in such case, evidence of a general reputation would be admitted.

*Peters ex dm,
Epif. Winton
v. Mills & al.
per Tracey,
Surry 1707.*

If the lessor claim as lord of a manor, having a right by forfeiture, he must prove that he is lord; and that the defendant is a copyholder, and has committed a forfeiture:

forfeiture: but the presentment of the forfeiture need not be proved; nor the entry or seisure of the lord for the forfeiture.

And to prove the defendant a copyholder, *Ld. Raym.* the plaintiff must prove an actual admit- 726.
tance; for it will not be sufficient to shew a descent to the defendant and that he paid quit-rents; because nothing vests in him before admittance, and an actual entry; and therefore if, after admittance, he were to surrender without making an actual entry, the surrender would be void.

Next as to the defendant's evidence.

If the defendant prove a title out of the lessor, it will be sufficient, though he have no title in himself. But then he ought to prove a subsisting title out of the lessor, for the production of an ancient lease, though for 1000 years, will not be sufficient, unless he likewise prove possession under it within twenty years.

So if the defendant produce a mortgage deed, where the interest has not been paid and the mortgagee never entered, it will not be sufficient to defeat the plaintiff, who claims under the mortgagor; because it will be presumed that the money was paid at the day, and consequently that it is no subsisting title: but if the defendant prove

Per Holt. Rule:
in *Wilson v. 110.*
and *Wetherby.*
by, 8 Ann
in Kent.

interest paid upon such mortgage, after the time of redemption, and within twenty years, it will be sufficient to nonsuit the plaintiff.

3 Burr. 1416.

In like manner, on the argument of the case of *Lade v. Holford*, Lord Mansfield declared that he, and many other of the judges, had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term outstanding in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee; but would direct the jury to presume it surrendered. The same doctrine is laid down in a subsequent case. And upon the same principle it hath been holden, that receipt for rent by a stranger, is no evidence of possession, so as to take it out of him in whom the right is; for it is no disseisin without the admission of him who has right, even though the stranger should make a lease to the tenant, by indenture, reserving rent; unless he also make an actual entry. But if the tenant declare he is in possession for a stranger, it may be proper evidence for a jury; especially if the stranger has any colour of title.

3 Burr. 1901.
1 Rol. Abr.
659, pl. 12.

As this action may sometimes turn on the question of MARRIAGE, it may be proper to notice the evidence which is necessary either to prove, or avoid it. A marriage *in fact* may be proved either by a copy of the register or by *viva voce* evidence

evidence of the ceremony, corroborated by circumstances, indentifying the parties.

But, in this action, it is not necessary to prove a marriage in fact: a *reputed* marriage will be sufficient; and that may be substantiated by cohabitation, reputation, and other circumstances, from which a marriage may be inferred. With respect to cohabitation, it is the practice to admit evidence of what the parties have been heard to say as to their being, or not being, married; inasmuch as the presumption arising from their cohabitation, is either strengthened or weakened by such declarations; these however are not to be given in evidence directly, though they may be assigned by the witnesses as a reason for their *belief*.

A sentence in the ecclesiastical court, in a cause of jactitation, has been held to be *conclusive* evidence against a marriage, till reversed by appeal. But this determination may fairly be doubted; for a cause of jactitation is ranked as a cause of *defamation* only, and not as a *matrimonial* cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect;

Burt v. Barlow, Pasch. 19 Geo. 3. B. R. M.S. penes me.

4 Burr. 2058.

Carth. 225. Str. 960.

Hales Com. Law, ed. 1778. fo. 48.

effect, viz. "That the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause. And if such a sentence is no plea to a new suit *there*, and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence, from going into new proofs to make out that, or any other, marriage.

"Legitimacy or illegitimacy" is another question which frequently occurs in the action of ejectment; and here it is to be remembered, that the evidence of the reputed father is admitted in disproof of the marriage; for whether he be the legitimate, or only the natural, father of the child, he is equally bound to maintain it. And in like manner the evidence of the mother is admissible; but if she be a married woman, she can only be admitted to prove such facts, as cannot, in their nature, be proved by any other person; as incontinence, &c. But she ought not to prove the want of access by her husband; for that fact may be notorious to the whole neighbourhood. And it would

Burr. S. C.
1 V. 27.

But Rex v. Read-
ing, Mich.
1 G. 2.

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be dangerous to encourage a married woman to bastardize her issue, when perhaps her husband may acknowledge their legitimacy.

In another case, lord *Raymond* would not suffer the wife's declaration, that she should not know her husband by sight, &c. to be given in evidence, till after she had been produced on the other side; because the fact of marriage was not disputed, but only the legitimacy. Yet in the same case, evidence was admitted of the wife being a woman of ill fame.

Pendril and
Pendril, Hil.
3 G. 2. *113*

In *Lomax* and *Holmden*, the marriage being proved, and evidence given of the husband's being frequently in *London*, where the mother lived, so that access was to be presumed, the defendants were admitted to give evidence of his inability, from a bad habit of body; but as that evidence only went to an improbability, and not to an impossibility, it was not deemed sufficient, and therefore the plaintiff had a verdict.

Str. 940.

It is not precisely settled what length of time shall be allowed for a woman to go with child after her husband's death. In one case it was resolved, that the issue, not being born till the end of eleven months after the death of the husband, was not
legiti-

Trin. 18 E.
1. Rot. 13.

Cro. Jac.
541.

legitimate, being born *post ultimum tempus mulieribus pariendo constitutum*. But in another case, where the husband died the 23d of *March*, and the child was born the 5th of *January* following, it was adjudged to be legitimate.

Thus much as to the point of evidence; it now becomes necessary to advert to the latter part of the present division.

After verdict, the successful party is, of course, intitled to the judgment of the court; but four days notice must first be given to the other party; within which time, if there was any defect of justice at the trial, by surprize, inadvertence, or misconduct, the court, on a proper application, will *suspend* the judgment, and grant a NEW TRIAL. This is an indulgence

which was not formerly allowed in the action of ejectment; because the injured party might bring a new ejectment: but as the courts became more liberal, they adopted this maxim, with respect to new trials, that in all cases of moment where justice is not done upon one trial, the injured party is entitled to another; in pursuance of which, it was at length established, that new trials may be granted in ejectment as well as in other actions, where the party applying would suffer by a change of possession.

But

1 Burr. 395.

4 Burr. 2225.

But though new trials may be granted in ejectment, if the circumstances of the case justify it, yet it is not every slip or mistake that will be admitted as a ground for it, and more especially if no injustice be done.

3 Burr, 1225.

IX. *The Judgment and its Incidents.*

The judgment in ejectment is a recovery of the possession, (not of the seisin or freehold), without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance, can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder: if he has a chattel-interest, he is in as a termor; and in respect of the freehold, his possession enures according to his right. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits.

1 Burr. 114.

As the Verdict is the ground of the judgment, it ought not to be entered for more land, or for different parcels, than the defendant was found guilty of by the verdict. But a variance between the verdict and judgment, occasioned by the misprison or default of the clerk in entering the judgment,

is

Cro. Jac.
631.

is not fatal, but hath been amended by the court after a writ of error brought. As where the Plaintiff had judgment, *quod recuperet terminum*, of a messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land; here, though the judgment was larger than the verdict, yet it was amended; because the variance appeared to arise from a misprision of the clerk, who had not pursued the verdict, which ought to have been his guide in making up the judgment, and no mistake in point of law, in giving the judgment. And the party ought not to suffer for the clerk's misprision, since the statute of 8 H. 6. c. 12. gives the judges, in affirmance of their judgment, power to amend and reform, what in their discretion seems to be the misprision of their clerks.

The judgment in ejectment is either against the casual ejector, or, against the tenant, upon a verdict: the former is generally before, the latter is always after, an appearance. Where there is a verdict, the judgment may be considered, either, where it is for the whole, or for part only, of the things demanded by the action; or, *Secondly*, where there are several defendants or plaintiffs, and one of them dies.

And

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And *first*, of the JUDGMENT against the casual ejector.

This judgment is entered in the three following cases: First, where there is no appearance at all; secondly, where the landlord defends alone, instead of the tenant; thirdly, where the tenant, having appeared, refuses at the trial to confess lease entry and ouster.

Where there is no appearance at all, which may be known by searching the judges books in the *King's Bench*, and the prothonotarys plea book in the *Common Pleas*, the plaintiff must draw up a rule for judgment with the clerk of the rules in the former, and with the secondary in the latter, court; and then make an *incipitur* of the declaration on a double half-crown stamp, and also on a roll of that term; these he must carry to the clerk of the judgments in the *King's Bench*, and to the prothonotary in the *Common Pleas*, who, on seeing the rule for judgment, will sign it accordingly. But in the *Common Pleas*, the plaintiff must make out a warrant of attorney for the defendant, and carry it, with the other papers, to the prothonotary, when he signs the judgment.

If a judgment be signed against the casual ejector, and it be made appear that no de-

declaration was rightly served, the court will set it aside. Also, where a judgment has been obtained against the casual ejector, but no trial lost, the court will, on payment of costs, and the tenant's entering into the common rule to confess lease, &c. set aside such judgment, as in other actions; and not put the tenant to the charge and hazard of recovering back his possession by another action.

Barnes 4to
edit. 179.

Secondly, Where the landlord defends alone, instead of the tenant, judgment must be entered against the casual ejector, that the plaintiff after having tried his cause against the landlord, and succeeded, may have the benefit of his verdict, and obtain possession under the judgment against the casual ejector, which under such verdict he could not.

1 Keb. 249.

Thirdly, Where the tenant, having appeared, refuses, at the trial, to confess lease entry and ouster, the judgment against the casual ejector cannot be entered, till the *postea* be returned, on which is endorsed, that the nonsuit was for want of confessing lease, &c.; for it does not appear that the defendant has not complied with the rule, till after the assizes, at which the cause was to have been tried, and there-

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therefore the judgment cannot be entered till the next term after such assizes.

Secondly, Where the plaintiff hath a verdict for the whole, or for part only, of the thing demanded.

If the plaintiff have a verdict for the whole, the entry of the judgment is, that the plaintiff *recuperet terram versus defendentem de &c. in tenementis predictis &c. quod defendens sapiatur*. The first judgment of this kind seems to have been about 14 Hen. 7. For originally the plaintiff recovered only damages in this action; because terms for years were so entirely, at common law, in the power of the freeholder, that they were generally very short, and often expired before the suit could be determined: but about the reign of king Hen. VII. terms began to swell to a great length, which necessarily and in reason altered the judgment. The remedy had not been commensurate to the injury, if the plaintiff could only have recovered damages, when he had made out his title to a long term, which upon the face of the record must appear to the court to be subsisting: and hence the judgment was *quod recuperet terram*.

F. N. B. 320.
H.

But if the judgment in ejectment be entered *quod recuperet possessionem termini predicti*,
K

Cro. El. 244.

prædicti, this is as well as if it had been *recuperet terminum prædictum*; because both signify the same thing, and the possession itself is to be recovered on the *habere facias possessionem*; hence it is, that if the term expire pending the suit, the plaintiff cannot recover the possession; because the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record that his title to it is determined: yet he shall have judgment for damages, because the trespass still remains.

Co. Lit. 285.
Savil 28.

3 Mod. 249.

Lil. Pr. reg.
503.

So if a man bring an ejectment, and lay the demise on the 1st day of *October*, when he has a title, as suppose an estate for another's life, and the 1st of *January* the *cestuy que vie* dies, and then the title appear to be in the defendant, — the plaintiff shall proceed in the action, and recover his damages; but he shall not recover the possession, because THAT, by the verdict, appears to belong to the defendant. The plaintiff recovers his damages, because it appears that the defendant unjustly withheld the possession, at the time the action was brought.

Judgment
book 72, 3.

If the plaintiff hath a verdict only for part, as for example, where he declares of an ejectment in *D.* and *L.* and the jury find

find the defendant guilty in *D.* only, the judgment is, *quod recuperet terminum in D. et quod defendens capiatur*; but then for the other part, whereof the jury acquitted the defendant, the judgment is, *quod querens sit in misericordia, et quod defendens eat inde sine die.*

When the defendant was found guilty, the entry used to be *quod defendens capiatur*; because the ejectment being a trespass *vi et armis*, which is a breach of the peace, he who was found guilty of it used to pay a fine to the king, for which at common law a *capias pro fine* issued. This process was misused by the officers, who would outlaw the defendant thereon, unless he compounded for the fine, which was uncertain in its nature; and the crown had no benefit by the fines, because they were never estreated into the exchequer. To prevent these abuses, this process is now taken away by statute, and the plaintiff is to pay the officer, in lieu of the fine, the sum of six shillings and eight-pence, which is to be allowed the plaintiff in his costs.

In the case of *Lindsey* and Sir *John Clerk*, the plaintiff had a verdict in ejectment upon an original in *B. R.* whereupon a writ of error was brought in parliament; and now, to prevent error, it was moved

5 and 6 W.
and M. c. 12.

Carth 390.
5 Mod. 285.

to have the opinion of the judges, upon the fifth and sixth of *William and Mary*, which takes away the *capias pro fine* in cases of this nature; "Whether since that statute any judgment *quod defendens capiatur*, ought to be entered on record in judgments on actions *vi et armis*, &c. or whether any other special entry ought to be made in lieu thereof, taking notice of that statute." After debate it was held, that this new statute having taken away the fine, no judgment of *Capiatur* should be entered against the defendant, nor any thing in lieu thereof, but the clause should be totally left out of the judgment.

It should therefore seem that this part of the judgment, *quod defendens capiatur*, should since that statute be omitted.

Cro. Car.
406.

In ejectment against baron and feme, the husband was acquitted, and the wife found guilty, and the judgment was *quod capiantur*, and held good; because that is only for the fine, which the husband must pay, for the wife cannot.

Cro. Car.
178.

Quod querens fit in misericordia pro falso clamore is not peculiar to this action, and therefore need not here be insisted on; but it may be here mentioned, that if the plaintiff in ejectment declare against three of several parcels, and one is acquitted

quitted of all, and the other two of part, but found guilty of the residue, it need not be twice entered that the plaintiff is in *miseriordia*; that is, once *pro falso clamore* against the person acquitted of all, and a second time *pro falso clamore* against the other two, who are acquitted of part. It is sufficient to say, that the plaintiff *fit in miseriordia quoad* all the defendants; and then upon the face of the judgment it may well enough be distinguished, *reddendo singula singulis*.

If the defendant be acquitted of part, and judgment be entered *quod defendens fit quietus, quoad* that part whereof he is acquitted, this is error; because the judgment in this action is not final, as in the writ of right; nor does it protect the defendant from any further suit, but only quits him against the title, set up by the plaintiff in THAT action. But since it appears, that the plaintiff's demand was groundless as to that part whereof the defendant was acquitted, the judgment as to that part is, with great propriety, *quod defendens eat inde sine die*; for the plaintiff as to that has no farther cause to detain him longer in court. And if one of the defendants die after verdict, the plaintiff, as hereafter

Cro. El. 769.

the survivors on suggesting his death: but then the judgment must be, that the survivors *capiantur*; and as to the person deceased *quod querens nil capiat*, &c.

1 Burr. 363.

The latter part of this judgment, *viz. quod querens nil capiat*, &c. has however been held to be unnecessary; because, on suggesting the death, it is awarded by the court, "that further proceedings shall stay against the person deceased."

Thirdly, Where there are several defendants or plaintiffs, and one of them dies, how the judgment is to be taken and entered.

Moor 469.

If there be several defendants, and one of them dies, after issue joined and before verdict, or after verdict and before judgment, the plaintiff may proceed against the survivors: but then he ought to suggest the death of the defendant on the roll, that is, on the *plea* roll; for it is not necessary to enter the suggestion on the *nisi prius* roll, unless it be to direct the judge between whom he is to try the issue, and that he has jurisdiction to try it.

1 Burr. 365.

And if the plaintiff proceed to trial, and obtain judgment against all the defendants, without such suggestion, it is error; because there can be no verdict or judgment against a person not in being. This is to

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be understood, where several defendants take the joint defence for the whole land demanded; for there they have a joint title, and consequently the death of one can not abate the action, because the whole interest comes by survivorship to the others; and then the plaintiff hath still persons before the court to defend the whole, and may, upon the suggestion of the death of one of the defendants, proceed against the rest. But where the declaration against the casual ejector is for several parcels, and these appertain to several defendants, and each takes a defence for part only, there, upon the death of one of them, the plaintiff cannot proceed against the survivors for ALL the land demanded in his declaration; for upon the defendant's appearing, each for a part only, there are declarations delivered against each of them, *quoad* his part only; and these declarations make them in the nature of distinct defendants, and consequently, as to that part which was defended by the person deceased, there is no person in court, against whom judgment can be given, or execution taken out.

So where there are several plaintiffs, and one dies before verdict, or judgment, the survivors may proceed; because, where several declare on one lease, it appears on the face

of the declaration, that they have a joint interest, which on the death of one must survive; and therefore the survivors, having the whole interest in them, may proceed for the recovery thereof. We may add to this, that an ejectment is an action of trespass, and if several commit a trespass, and one dies, there can be no reason wherefore the rest should become dispensable for the trespass; and therefore they may be proceeded against. So where an ouster, which is a trespass, is committed on the joint possession of several, and one dies, as the joint interest survives, it is just and reasonable that the survivors should punish the injury which was done to the possession; and therefore surviving plaintiffs are allowed to proceed.

Cro. Car.

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But if one of the joint defendants die after issue joined and BEFORE verdict, and the plaintiff proceeds to trial against all, and afterwards suggests that one of the defendants died AFTER the verdict, which the other defendants admit to be true, on which the plaintiff hath judgment against the survivors, who bring a writ of error, the court it seems cannot correct this after judgment given; because the judgment, as it is given, must stand, the court having no power over it, at least after the term in which it is given. And in the *Exchequer Chamber* they doubted

doubted if the error, if such there were, could be tried there; because the statute of *nisi prius* did not extend to that court, which was newly created.

In a later case it is said, that if an ejectment be brought against two, and issue be joined, and then one of them dies, and a *venire* is awarded as to both the defendants, and a verdict given against both, yet, upon suggestion of the death of one of them upon the roll, the plaintiff shall have judgment for the whole against the other. Ld. Raym. 717.

But, in such case, it is certainly the better way, to suggest the death on the roll, before the trial; and to award a *venire* to try the issue against the surviving defendant. 1 Burr. 363.

If an ejectment be brought against baron and feme, and the plaintiff hath a verdict against both, but before judgment the husband dies, the plaintiff, on suggesting his death, may have judgment against the wife; not only because it is a trespass committed by the wife, and therefore she is punishable for her own act, which is injurious to another; but because, where the wife is found guilty of the ejectment, she must either have obtained that unlawful possession jointly with her husband, and then it survives; or else she must have had the whole possession in her own right; and in either case 1 Rol. Rep. 14. Cro. Jac. 356.

case the plaintiff may punish her, and recover the possession, which is wholly in her on the death of her husband.

1 Rol. Abr.
768.

Where there is but one plaintiff in ejectment, and after verdict on a trial *AT BAR*, but before judgment given, the plaintiff dies, yet the court may proceed to give judgment for him though he be dead; because the judgment and verdict, being both in one and the same term, relate to the first day of that term, at which time the plaintiff was alive.

But if the trial be at *nisi prius*, and the plaintiff die after verdict and before the day *in banco*, no judgment can be given; because the *postea* comes in, as of the term subsequent to the death of the plaintiff; and the judgment that is entered thereupon cannot, by any relation, precede the death of the plaintiff: consequently the judgment, whether given for or against him, must be erroneous.

Sid. 385.

This was at common law; for now, by the 17 *Car. 2. c. 8.* it is enacted, that “the death of either party, between the verdict and judgment, shall not be alledged for error; so as judgment be entered within two terms after the verdict.” In the construction of this statute, it hath been holden, that if judgment be *signed* though it

it be not *entered* on the roll, within two terms after the verdict, it is sufficient: and it hath likewise been holden, that if either party die *after* the commencement of the assizes, though before the trial, it is a case within the remedy of the statute; because the assizes are in law but one day.

Salk. 8.
pl. 21.

And formerly, though the death of the plaintiff abated the action, yet because the lessor of the plaintiff was looked upon by the court to be chiefly concerned IN INTEREST, if there was any man of the same name with the plaintiff, the court would take him to be the person; and in such case would not suffer the action to abate, because the lease was made to the plaintiff, only to try the title. And it is said that the if the nominal plaintiff release to one of the tenants in possession, who is made defendant, such release is a good bar; because the plaintiff cannot recover against his own release, since he is plaintiff of record. But *quare*, if such release were pleaded, whether the court would not permit the lessor of the plaintiff to change the name of the nominal plaintiff? for this release is said to be a contempt.

1 Mod. 252.

3 Keb. 772.

Brownl. 128
to 133.

Salk. 260.
1 Mod. 252.

At this day, the defendant cannot plead such release; because he is tied down, by the rule, to rely on the general issue: but

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if he were to offer such release on the trial, I do not think it would be admitted to defeat the action; because the courts will use every means, in their power, to discountenance the practice of stealing away a nominal plaintiff.

Incident to the judgment are the costs, or expences of the action, which are therefore, as next in order, to be treated of.

If the tenant do not appear, and judgment is consequently entered against the casual ejector, the plaintiff has no other remedy for his costs, than by an action for the mesne profits; in which they are recoverable against the tenant, as consequential damages.

Salk. 259.
Barnes 4to
ed. 1822.

But if the tenant appear, and is made defendant, under the usual terms of confessing lease, &c. and afterwards, at the trial, refuses to make that confession, he is liable, upon the rule by which he was made defendant, to the payment of costs; and if they are not paid, an attachment lies against him: and this is all the remedy which the plaintiff has for his costs, if he be nonsuited, by the defendant's not confessing lease, &c. If the tenant appear, and confess lease, &c. and a verdict is given against him, upon the trial, the judgment thereupon is entered against

against the tenant; and upon that judgment, the plaintiff may take out execution, as in ordinary cases: for this is not a case provided for by the rule.

By the words of the old rule it appears, that the original practice *in banco regis* was, that upon not confessing lease, &c. the defendant paid no costs. And thus, the rule in the *King's Bench* differed from that of the *Common Pleas*, which in such case required the defendant to pay the plaintiff his costs, to be taxed by the prothonotary, thereon: but, *in banco regis*, the rule only excused the plaintiff from the costs of the *non pros* in case the defendant did not, at the assizes, confess lease, &c.; and therefore, in 13 Car. 2, upon a motion that the defendant should pay costs, for not confessing lease, &c. it was denied. But afterwards, the rule in the *King's Bench* came to be, that upon the defendant's denying at the assizes, to confess lease, &c. the rule for confessing it should be carried to the master, who should tax costs upon it; which costs should be demanded of the defendant, by some person having authority from the plaintiff's lessor, for so doing; and then, if the same were not paid, the court, upon affidavit and motion, would grant an attachment against the defendant; for it was but

1 Keb. 28.

Ibid. 502.

Salk. 259.
Lil. pr.
reg. 503.

but reasonable, that when the plaintiff was at an expence, to bring his cause to a trial, the defendant, who deprived him of the benefit of that trial, should pay his costs; hence it was, that the practice in the *King's Bench* was altered, in compliance with that of the *Common pleas*, that the whole business of ejectments might not run through the latter court.

2 Wils. 7.

The lessor of the plaintiff died BEFORE THE COMMISSION-DAY of the assizes, yet the cause was called on, and the plaintiff was nonsuited, because the defendant did not confess lease, &c. The court being afterwards moved, that the prothonotary might tax costs, upon the consent rule, for the executor of the plaintiff's lessor, it was holden that he was not intitled to costs, the rule being merely personal. But in another case, where the plaintiff's lessor died, AFTER THE TRIAL of the cause, it was ordered that the defendant should pay, to the representative of the plaintiff's lessor, the costs which had been taxed on the consent rule.

Barnes 4^{to} ed.
119.

Mich. 6
Geo. 2.
Tilly and
Baily.

Where a verdict is given for the defendant, or the plaintiff is nonsuited, for any other cause than that of the defendant's not confessing lease, &c. the defendant must tax his costs on the *posse*, as in other actions,

actions, and sue out a *capias ad satisfaciendum* for the same against the plaintiff, which he must shew, under seal, to the plaintiff's lessor, and at the same time serve him with a copy of the consent rule; and then, if the plaintiff's lessor, being required, refuse to pay the costs, the court, on motion, will grant an attachment against him.

The plaintiff in ejectment, though he be but nominal, yet if he be not found, or if he be not able to pay the costs, the attorney or solicitor is liable, and may be committed until he pay them, or produce a sufficient plaintiff.

2 Lev. 66.
6 Mod. 309.

So if a stranger carry on a suit in another's name, who has title, and yet is so poor that he cannot pay the costs; in case he fail, the court, upon an affidavit of this matter, will order the person, who carried on the suit, to pay costs to the defendant.

If baron and feme be lessor in ejectment, and the baron dies after entering into the rule, the feme is notwithstanding liable to the payment of costs; because costs are to be paid by the lessor of the plaintiff, and both of them are in the lease.

1 Keb. 827.

If a man has a verdict in ejectment, and costs are taxed, and an attachment issues for the nonpayment of those costs, the defendant

1 Sid. 279.

1 Sid. 279.

Salk. 253.
Barnes 4to
ed. 133.

defendant shall not have an ejectment against the plaintiff IN THE SAME COURT, till he has paid the costs; because every court can enforce obedience to their own rules, and they will see that obedience paid, before they suffer a man to proceed in a cause of the same kind. Yet it was anciently ruled, that a man might bring a new ejectment IN ANOTHER COURT, without costs paid; and the reason assigned was, that another court cannot take cognizance of the rules of a distinct court. This distinction is now done away, and the courts of *Westminster-hall* consider a former ejectment in ANOTHER COURT, in the same light as a former ejectment in the SAME COURT; and therefore, they will stay the proceedings in a new ejectment, till the cost of the former shall be paid; as well where the former ejectment was in ANOTHER, as where it was in the SAME COURT.

4 Mod. 379.

BUT the principle of this rule is the vexation of the party; and therefore if the DEFENDANT, against whom there has been a verdict in a former ejectment, bring a new ejectment against the former plaintiff, for the same premises, the court will not stay the proceedings in such new ejectment, till the payment of costs in the former. Yet no
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new ejectment can be brought by the defendant after a recovery against him, till he has quitted the possession, or the tenants have attorned to the plaintiff.

Salk. 258.
pl. 12.

So where the lessor of the plaintiff was in custody, under an attachment for the non-payment of costs in a former ejectment, and he brought a new ejectment, upon the same demise, the court refused to stay the proceedings therein, till the costs of the former should be paid.

Barnes 4to
ed. 180.

X. *The writ of error.*

If the defendant do not at the trial confess lease, entry and ouster, according to the rule, when he has accepted a declaration, he cannot have a writ of error; because the judgment in such cases is against the casual ejector, and therefore the defendant not being a party to the record of that judgment, cannot have a writ of error thereon: and if the defendant bring a writ of error in the name of the casual ejector, such ejector, being a friend to the plaintiff's lessor, may release the errors; or, upon a motion for a *non pros*, the court will order it to be entered. But in a writ of error from an inferior court, in the casual ejector's name, the court will not enter a *non pros*, though his release of errors

Barnes 4to
ed. 181.

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T. Raym. 93.
1 Keb. 705.
740.

be shewn; because they ought not to proceed in this compendious way, by confessing lease, &c. So if an infant be tenant in possession, and the plaintiff obtains judgment against the casual ejector, for not confessing lease, &c. and the infant brings a writ of error in the casual ejector's name, and the defendant in error sets up a release from the casual ejector; upon making out this to be the case of an infant, the court, on motion, will not suffer such a release to be pleaded in bar of the writ of error; because no laches are imputable to the infant, for not confessing lease, &c. and therefore here they renew the old practice, of suffering the defendant below to carry on the suit, in the casual ejector's name, to the end.

By the 16 & 17 Car. 2. c. 8. it is enacted, that "no execution shall be stayed by
" writ of error, upon any judgment, after verdict *in ejectione firmæ*, unless the plaintiff in
" such writ of error shall become bound, in a
" reasonable sum, to pay the plaintiff in eject-
" ment all such costs, damages, and sums of
" money, as shall be awarded to such plain-
" tiff upon the judgment being affirmed, on
" a nonsuit or discontinuance had."

Sect. 4.

And by another clause of the same statute,
" in case of affirmance, discontinuance, or
" nonsuit, the courts are to issue a writ, to
" inquire as well of the mesne profits, as of
" the

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"the damages by any waste committed, after the first judgment; and are thereupon to give judgment, and award execution, for the same, and also for costs of suit."

This act does not extend to any writ of error, brought by any executor or administrator. And it hath been held that the plaintiff in ejectment may bring an action of trespass for the mesne profits, pending a writ of error; for it may be that the writ of error was only brought for delay; but supposing it to be otherwise, and that the plaintiff should recover for the mesne profits, such recovery may be given in evidence to the jury, on a writ of enquiry, to lessen the damages.

12 Mod. 138.

In like manner, it hath been holden that the plaintiff may enter, pending the writ of error upon a judgment in ejectment, if he can find the possession vacant, for the writ of error binds the court, not the right of the party: but he must take care that he do not enter with force.

Ld. Raym.
808.

An administrator brought a writ of error, upon a judgment in ejectment against his intestate; and though the judgment was affirmed, and the writ of error was brought in delay of execution, yet, it was holden that the administrator should not pay costs: the reason is, that he is not bound by the judgment, but only the assets of the de-

1 Vent. 166.
1 Mod. 77.
4 Mod. 244.
3 Lev. 375.
396.
Carth. 281.
Annaly 367.

Gilb. C. P.
274.

ceased. And besides, as the administrator acts *in auter droit*, he is not presumed to bring the writ of error merely for delay.

XI. Of the execution.

When the judgment in ejectment was extended to a recovery of the term itself, (the judgment originally being only for damages) it of consequence gave birth to the *habere facias possessionem*, in this action. In real actions, where the freehold was recovered, the demandant had execution by the writ of *habere facias seisinam*;—in ejectment therefore, it was but just that a similar remedy should be permitted to the plaintiff: who, as he now had judgment to recover the possession of the land, might put the sentence of the law in execution, by virtue of the *habere facias possessionem*.

Where the landlord is admitted to defend instead of the tenant, and judgment is consequently entered against the casual ejector, with a stay of execution till further order, if the landlord be afterwards nonsuited for not confessing lease, &c. or if a verdict be given against him upon the trial, the plaintiff must move the court for leave to take out execution against the casual ejector; and the day of shewing cause against the motion, is the proper time

Barnes 4to
edit. 182.

2 Burr. 757.

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time for the landlord to make his stand against the plaintiff's taking out execution, and getting into possession.

In the writ of execution is to be considered,

First, When the writ is to be sued.

Secondly, How it is to be executed.

Thirdly, How the plaintiff is to be quieted, and what relief he has, when his possession is disturbed after execution executed.

At the common law, if the plaintiff, after he had obtained judgment in any PERSONAL action, had lain quiet, and had taken out no process of execution within the year, he was put to a new original upon his judgment;—as in an action of debt, writ of annuity, or other personal action, wherein debt or damages were recovered: but in REAL actions, where land was recovered, the demandant after the year might take out a *scire facias* to revive his judgment. The reason of the difference seems to be, because the judgment being PARTICULAR, in the REAL action, *quoad* the lands, with a certain description, the law required that the execution of such judgment should be entered on the roll, that it might be seen whether execution was delivered of the same thing of

2. Inst. 469,
but see
2 Salk. 600.

which judgment was given; for which reason, if there was no execution appearing on the roll, a *scire facias* issued, to shew cause why execution should not issue. But where the action was PERSONAL, no *scire facias* was issuable by law on the judgment, because in such action there was no judgment for any particular thing, with which the execution could be compared; and therefore after a reasonable time, which was a year and a day, it was presumed to be executed: and for that reason the law allowed the party no *scire facias*, to shew cause why there should not be execution; but if the party had slipt his time, he was put to his action on the judgment, and the defendant was obliged to shew, how that debt, of which the judgment was evidence, had been discharged,

To remedy this, and to make the forms of proceeding more uniform in both actions, the statute of *Westminster 2. c. 45*, gave the *scire facias* to the plaintiff, to revive the judgment, where he had omitted to sue execution, within the year after judgment was obtained. The words of the act are, "*Quod*
 "*ea quæ inveniuntur irrotulata coram eis qui*
 "*recordum habent, sive servitia aut consue-*
 "*tudines recognita, aut alia quæcunque in-*
 "*rotulata, si recens sit cognitio, viz. infra*
 "*annum, statim habeat conquerens breve de*
 "*executione*"

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*“ executione illius recognitionis ; Et si forte a
“ majore tempore transacto facta fuerit illa re-
“ cognitio, præcipiatur vicecomiti quod scire fa-
“ ciat, &c.”*

2 Inst. 469.

It has been doubted, on these words, whether a *scire facias* lay to revive a judgment in ejectment for the land ; not only because the term or possession was not, at the making of this act, recoverable in the action, and therefore the act could not be supposed to provide for it ; but also, because the words of the act seem to confine the *scire facias* to those judgments, where only debt or damages were recovered. Upon

1 Sid. 351.

these reasons I take the resolution in *Siderfin* to be grounded ; because though upon a judgment in ejectment, there may go a *scire facias* after the year for the damages, yet says the book, it is not absolutely necessary that there should be a *scire facias* as to the land. The practice however seems to have prevailed otherwise ; and there seems to be a reason for the practice.

1 Salk. 258,

600.

3 Salk. 319.

Ld. Raym.

806.

The words of the act are, *“ five servitia five
“ consuetudines, five alia quæcunque irritu-
“ lata,”*—which should comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at common law ; and therefore if the plaintiff in ejectment, after the year, take out an execution without the *scire facias*, the court will

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award a writ of restitution, *quia erronee emanavit*.

The reason why the plaintiff is put to his *scire facias* after the year is, because where he lies quiet so long after judgment, it shall be presumed that he hath released the execution; and therefore the defendant shall not be disturbed in his possession, without being called upon, and having an opportunity in court of pleading the release, or shewing cause, if he can, why the execution should not go.

3 Inst. 378.

Gilb. Law of
Ex. 92, 3.

Leges Lom-
bardi, lib. 2.
tit. 43.

Co. Lit. 254.
b.

But there is another reason for this doctrine, which is, that after the year and a day, the plaintiff and defendant are both out of court; for the warrant of attorney is only *quousque placitum terminetur*, and the defendant's *placitum* is determined by the judgment; but as to the plaintiff, HE remains in court for a year and a day afterwards, either to receive and acknowledge satisfaction, or to take out process in order to obtain it. The year and a day was the ancient term for the tenant to demand the investiture, and to do fealty, in the lord's court; and, if it was not done within that time, the feud was lost: so that this seems to have been the general time, by which laches were computed, in the old law. Accordingly we find, that, at the common

mon law, upon a fine, or final judgment in a writ of right, the party grieved could only claim within a year and a day; the same time was allowed for continual claim, and for many other purposes. In like manner, this was the time during which the acts of the court remained in force, and therefore, after this time, all proceedings were said to be asleep, till a new day in court was given to the parties, by *scire facias*.

Though there is only a year and a day to execute the judgment, yet if execution be taken out within, and continued beyond, the year, there is no occasion for a *scire facias*; for then, there can be no presumption that the plaintiff has released the execution: because there appears to be an execution duly taken out; and it is the fault of the sheriff, that it was not executed.

But if the plaintiff die within the year and a day, his executors cannot take out execution without a *scire facias*, because they are not parties to the judgment. Though if an execution be properly sued out in the life time of the testator, the sheriff may execute it after his death; because it is an authority from the court, and not from the party. It hath also been held that the writ of possession, in ejectment, shall have relation to

2 Inst. 471.

2 Leon. 77, 8.

14 Hen. 7.

16.

4 Burr. 1970.

to it's teste; and therefore, though it be not actually sued out till after the death of the lessor of the plaintiff, yet if it be tested before his death, it is regular.

6 Mod. 288.

If the plaintiff hath judgment with stay of execution for a year, he may, after the year, take out his execution without a *scire facias*; because the delay is by consent of parties, and in favour of the defendant: and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed to take any advantage of it, when it appears to be done for his advantage, and at his instance.

1 Keb. 785.

6 Mod. 288.

But it seems that this delay of execution, being only the compromise or agreement of the parties, is never entered on the roll; and therefore after the year, the plaintiff ought to move the court for a *scire facias*, least the execution should be defeated, *quia erroneé emanavit*.

3 Co. 88.

Cro. El. 416.

6 Mod. 288.

2 Inst. 471.

So if the defendant bring a writ of error, and thereby hinder the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuited, or the judgment affirmed, the defendant in error may proceed to execution after the year, without a *scire facias*; because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce till he hears the

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the judgment above. Besides, while the cause is depending on the writ of error, it is still *sub judice*, whether the plaintiff shall recover the land or not; and the year for the execution ought to be accounted from the final judgment given.

Indeed in one case it is laid down, that if a writ of error be brought AFTER the year is elapsed, and thereupon the former judgment be affirmed, such affirmance will revive the former judgment, and enable the party to take out execution without a *scire facias*. But from that case it seems, that if the plaintiff in error be nonsuited, or the writ of error be discontinued, there can be no execution of the former judgment without a *scire facias*. So if the plaintiff be restrained by injunction out of chancery, for a year, he can not take out execution after the year without a *scire facias*; because the courts of law do not take notice of injunctions, as they do of writs of error: besides, it might be no breach of the injunction, to take out execution within the year, and continue it down by *viest comes non misit breve*, which it seems cannot be done in the case of a writ of error; because that removes the record out of the court where the judgment was: and there-

1 Rol. Rep.
104.

6 Mod. 288.
Salk. 322.
Str. 301.

therefore there can be no proceedings below, till it be affirmed and returned to the inferior court.

To a *scire facias*, to have execution for land and damages, the defendant pleads an entry into the land after judgment, and before the *scire facias* issued; this was held an ill plea, because the defendant did not answer to the damages as well as to the land, which were both comprised in the *scire facias*; and therefore, the plaintiff had judgment to take the writ of execution for both land and damages: because if he does not defend the whole, there must be an execution according to the judgment remaining on record. And in this it differs from a debt in *pais*, where if a man plead to part only, the plaintiff must take judgment as to the residue, otherwise it will work a discontinuance.

Skin 161.

Tenant for years had judgment in ejectment, and after the term had incurred, he brought a *scire facias quare executionem habere non debet* of the land, and his damages and costs; the defendant demurred; and it was held by the court, that though the plaintiff might have had a *scire facias* for his damages and costs, yet this *scire facias* being for the term likewise, which was incurred, was therefore ill; and a new
scire

seire facias ought to issue. It was afterwards argued by *Holt*, that the *seire facias* in this case, was good for the damages; but the court were of a different opinion, and accordingly a new *seire facias* was granted.

Secondly, How the writ is to be executed.

The words of the writ are, "*quod habere facias possessionem*," so that there must be a full and actual possession given by the sheriff, and consequently all power necessary for this end must be given him; therefore if the recovery be of a house, the sheriff may justify breaking open the door, if he be denied entrance by the tenant; because the writ cannot be otherwise executed.

5 Co. 91. b.

If the plaintiff recover several messuages, in the possession of different persons, the sheriff must go to each house, and deliver the possession thereof; which is done by turning the tenants out of each of the houses. For the delivery of the possession of one messuage in the name of all, is not a good execution of the writ, because the possession of one tenant is not the possession of the other, each having a several possession.

1 Rol. Abr. 886.

But it seems by *Rolle*, that if all the messuages had been in the possession of one tenant, it had been sufficient to give possession

1 Rol. Abr. 886.

1 Rol. Rep. 421.

1 Leon 145.

session of one in the name of all; but, without doubt, the surest and best way is for the sheriff to remove all the tenants entirely out of each house, and when the possession is quitted, to deliver it to the plaintiff. For if the sheriff thrust out all the persons he can find in the house, and give the plaintiff, as he thinks, quiet possession, and after the sheriff is gone there appear to be some person lurking in the house, this is no good execution; and therefore the plaintiff may have a new *habere facias*, because he never had execution.

1 Rol. Abr.
886.

Where the recovery is of land, and there is more demanded than recovered, as suppose the demand to be for five hundred acres, and a verdict and judgment only for an hundred acres, — it seems doubtful how the sheriff is to give execution. *Rolls* says it is sufficient to give the plaintiff possession of two or three acres, in the name of the whole. This indeed seems to be the safest way for the sheriff, because he executes the writ at his peril, and therefore if he give possession of any land not recovered, and not in the *habere facias possessionem*, he is a trespasser, and may be punished in an action of trespass. — But because the *habere facias* is to give the plaintiff the benefit of his judgment, and that cannot be done without an actual pos-

possession be given of the whole quantity, is hath been held, that the sheriff doth not discharge his duty by giving one acre in the name of all, but he ought in such case to set forth all the acres in particular: for to have it otherwise, would be to leave the execution uncertain, and consequently not to give the plaintiff the full benefit and advantage of his judgment. At this day, however, the practice is, for the plaintiff to give the sheriff security to indemnify him from the defendant, and then for the sheriff to give execution of what the plaintiff demands: but if the plaintiff take more than he has recovered, and shewn title to, the court will set it right, in a summary way.

1 Burr. 629.
5 Burr. 2673.

If the execution goes to the sheriff, for twenty acres, it seems the sheriff must give twenty acres, according to the common estimation of the county where the lands lye.

1 Rol. Rep.
420.
1 Rol. Abr.
886.

Thirdly, How the plaintiff is to be quieted, and what relief he has, when his possession is disturbed after execution executed.

And here it is farther observable, that the writ of execution is only returnable at the election of the plaintiff; and the court, at the instance of the defendant, will not direct the writ to be returned. This seems to be left to the choice of the plaintiff, that he may do what is most for his advantage, in order

2 Keb. 245.
Palm. 289.
1 Rol. Rep.
353.
6 Mod. 27.
2 Brownl.
253.

order to have the full benefit of his judgment; and the best way to effect that is, to suffer him to renew the execution at his pleasure until a full execution be had. But the plaintiff cannot renew execution, after one *habere facias* is returned and filed, because it then appears on record, that the plaintiff hath had the benefit of his suit, and then the new execution is but *actum agere*, and consequently superfluous; and therefore the court will not oblige the sheriff to make any return, unless at the desire of the plaintiff.

2 Brownl.
216.

If the writ be returned by the sheriff, though not filed, it seems no new *habere facias* can issue; because when the return is made, it becomes a record, which the court then becomes entitled to.

Palm. 289.

But where the writ is neither returned nor filed, there is then no act of record by which it can appear to the court that the plaintiff hath had any benefit of his judgment; and therefore upon a suggestion that *vicecomes non misit breve*, the plaintiff is entitled to a new writ, because the omission of the officer shall not turn to the plaintiff's delay or prejudice. — But the new writ cannot issue until the return of the first writ be out, because until the return be past, *non constat* to the court, but the sheriff may do his duty,

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duty, and the plaintiff thereby have the full benefit of his judgment, and then there can be no occasion for a new *habere facias*.

If the officer be disturbed in the execution of the writ, on an affidavit the court will grant an attachment against the party, whether he be the defendant or a stranger; because the writ is the process of the court, and any disturbance given to the execution of it, is a contempt to the authority of the court from whence it issues; and as such, will be punished by the court. The process is not understood to be executed, nor the execution compleat, until the sheriff and his officers be gone, and the plaintiff left in quiet possession. 6 Mod. 27.

But after possession given, either on the *habere facias*, or by the agreement of the parties, the law seems to make a difference, where the plaintiff is turned out of possession by the defendant, and where by a stranger. When it is done by the defendant himself, the plaintiff may have either a new *habere facias*, or an attachment; because the defendant himself shall never by HIS OWN ACT keep the possession, which the plaintiff hath recovered from him BY DUE COURSE OF LAW. But where a stranger turns the plaintiff out of possession, after execution fully executed, the plaintiff is put to his

1 Keb. 779,
785.

M

new

new action, or to an indictment, for the forcible entry, where the force will be punished; the reason is, that the title was never tried between the plaintiff and the stranger, who may claim the land by a title paramount the plaintiff; or he may come in under him; and then the recovery and execution, in the former action, ought not to hinder the stranger from keeping that possession, which he may have a right to. If the law were otherwise, the plaintiff might, by virtue of a new *habere facias*, turn out even his own tenants, who come in after the execution executed; whereas the possession was given him only against the defendant in the action, and not against others, who were not parties to the suit.

Stiles, 318.

Thus, in the case of *Fortune and Johnson*, the court was moved for an attachment against *Johnson*, for ejecting one who had been put in possession by an *habere facias*; but because it appeared that *Johnson* claimed under a prior judgment, the court would not make any rule in it, because it was title against title; and therefore left them to take their course at law.

Stiles, 408.

The plaintiff had judgment in ejectment, and by agreement afterwards, the defendant was to hold the land for the residue of his term, and held it accordingly

ingly for some time, and then the plaintiff took out an *habere facias*, and executed it: the defendant moved the court, for restitution on the agreement, but the court would not grant it, but left the defendant to his action on the case on the agreement, for the judgment was entered absolutely. But if the judgment be entered with a *cesset executio* for such a time, there if the plaintiff take out execution within the time, the defendant shall have restitution; because the judgment was entered with this limitation, that the plaintiff should not have the fruit of it until such a time. But how does this appear to the court? since it seems that the *cesset executio* is not entered on the roll. The difference seems to be between a judgment by confession, and a judgment on a verdict. Where the former is given with a *cesset executio*, if the execution be afterwards taken out, contrary to the agreement, the court will set it aside, and punish the attorney; but where judgment is given on a verdict, there the verdict is the ground of the judgment, and the court will not take any notice of the subsequent agreement of the parties, but leave them to their remedy. Yet according to the present practice, if the truth were manifested to the court by affidavit,

1 Sid. 379.

the party might obtain relief from its summary jurisdiction.

XII. Of the action for the mesne Profits.

It has already been observed, that an ejectment is not a proper action for the mesne profits. The reason is obvious. An ejectment, at this day, is a *feigned* action brought against a *nominal* defendant, and generally on a *supposed* ouster: but an action for the mesne profits is wholly dependant on *facts*, being brought against the *real* tenant, for profits which he has *actually* received. In the one case therefore the damages are merely *nominal*: in the other, they are such as the plaintiff has sustained by a *real* injury.

2 Burr. 668.

An action for the mesne profits is consequential to the recovery in ejectment; and it is an action of trespass *vi et armis*, brought by the lessor of the plaintiff, in his own name; or in the name of the nominal lessee, (for it may be brought in either shape,) against the tenant in possession, to recover the value of profits, unjustly received by the latter, in consequence of the ouster complained of in ejectment. It is usually brought by the lessor of the plaintiff

EJECTMENT.

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in his own name; and in that case, on proving a good title in himself, and an actual ouster and perception of profits by the defendant, antecedent to the demise and ouster in ejectment, he will recover damages for those profits: but they are seldom an object of litigation, as the demise and ouster in ejectment are generally laid soon after the time, when the lessor's title accrued.

If the action be brought in the name of the nominal lessee, the court, upon application, will stay the suit till security be given for answering the costs; but they will not permit such nominal plaintiff to release the action, and therefore his release hath been set aside, as a contempt of the court.

It was formerly doubted, whether an action for the mesne profits could be brought, in the name of the lessee or nominal plaintiff in ejectment, after a judgment by default against the casual ejector; but it is now settled that there is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant; in the latter, it is confessed.

After judgment by default, the costs in ejectment are recoverable, and are therefore

M 3

usually

Decosta and *Paul*
Atkins Hil. *cas*
4 G. 2. 87 *v. k.*

Skin 247.
Salk. 260.

2 Burr. 665.

usually declared for, as consequential damages, in the action for mesne profits.

Lil. pr. reg.
499.
Str. 960.
and see
2 Burr. 666.

As to the proof required in this action, it was formerly holden, that if the action were brought by the lessor of the plaintiff in any case, or by the lessee or nominal plaintiff after a judgment by default against the casual ejector, the defendant in such action might controvert the plaintiff's title, or right to the possession, during the time when the mesne profits arose: for though it was admitted, that where the tenant had appeared, and confessed lease entry and ouster, he was estopped by that confession from afterwards disputing the plaintiff's title, in an action for the mesne profits, brought by the lessee or nominal plaintiff; yet it was holden, that the benefit of such estoppel could not be extended to the lessor of the plaintiff, in as much as he was no party to the record in ejectment: and upon a similar principle it was holden, in the other case, that the tenant, who had never appeared, could not be estopped by the judgment against the casual ejector. But it is now settled, upon principles, that after a recovery in ejectment, the tenant is estopped from controverting the plaintiff's title, in a subsequent action for the mesne profits, provided the plaintiff only proceeds for mesne

2 Burr. 668.

EJECTMENT.

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mesne profits from the time of the ouster complained of in ejectment: but if he proceed for antecedent profits, he must prove his title to the premises from whence they arose, to shew his right to receive them.

Hence it should seem, that in order to prove the plaintiff's title in an action for the mesne profits, it is only necessary to produce the judgment in ejectment; and so is the practice, where the judgment is after verdict: but after a judgment by default, the practice is different; for then it is usual not only to produce the judgment, but also to prove a writ of possession executed. This latter proof does not seem to be necessary; for if the tenant be concluded, by the judgment in ejectment, from controverting the plaintiff's title, he is consequently concluded from controverting his possession, because his possession is a part of his title.

As to the value of the mesne profits, the judgment in ejectment proves nothing; and therefore it must necessarily be proved: but in estimating that value, the jury are not confined to the mere rent of the premises; for they may give whatever damages they think proper: though the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years.

Of the writ of quare eject infra terminum.

F. N. B. 197.
S.

The writ of *quare eject infra terminum* lieth, where a man leaseth lands to another for years, and after he entereth and maketh a feoffment in fee, or for life, of the same lands to a stranger; in which case the lessee may have this writ against the feoffee, or lessee for life.

F. N. B.
T.

And he shall recover his term again, and damages also, if the term be not ended; if it be ended then, all his damages. Yet if the term expire pouding the writ, the writ will not abate.

F. N. B. 198.
U.

The process on the writ is summons, attachment, and distress *infinite*, and not process of outlawry, because the writ is not *vi & armis*.

F. N. B. 198.
A.

This writ was devised, as it is said, by "a wise man called *William Moreton*," who adopted it for the following reason. — If a man had leased land for years, and after had ousted his lessee, and made a feoffment of the land, to a stranger in fee; the lessee could not have a writ of *ejectione firme* against the feoffee, because he did not put him of possession; his only remedy being by entering again upon the land, and then if the

the feoffee put him out, the lessee might have a writ of *ejectione firme, vi & armis*, against him, for the wrong done him. But before entry he had no remedy against the feoffee; for he could not have an ejectment, no force being used; and there could be no force where there was no entry; therefore, the lessee was without remedy, any otherwise than by entering on the land, which he had authority to do by his lease. But sometimes men of opulence or power, by force, kept out their lessees, with whom they had contracted, and who dared not enter; and then the tenant was without remedy, until this writ was devised: And it was devised by the equity of the statute of *Westminster 2. c. 24.* which enacts, that "as often as it shall happen in the chancery, that in one case a writ is found, and in like case, falling under the same law, and wanting the same remedy, none is found, the clerks of the chancery shall agree in making a writ."

Yet if the lessor put out the lessee, and presently make a feoffment in fee, so as the feoffee be party or privy to the ouster of the lessee, the lessee shall have a writ of ejectment *vi & armis* against the feoffee;

F. N. B. 198.
B.

feoffee; because he is party to the ouster,
and to the wrong done him:

The writ.

F. N. B. 198.
B.

*Rex vic', &c. salutem: Si A. fecerit, &c.
tunc sum' &c. B. quod sit, &c. Ostensurus
quare deforc' præfat' A. unum messuag' cum
pertin. in N. quod C. ei dimisit, ad terminum
qui nondum præteriit; infra quem terminum,
idem C. præfat' B. messuag' illud vendidit;
occasione cujus venditionis idem B. præfat' A.
de Messuag' prædict' eiecit, ut dicitur; &
habeas, &c.*

F. N. B. 198.
C.

It lieth where the son and heir of the
lessor maketh a feoffment, &c. and the
feoffee ousteth the lessee.

Id. 198. D.

And if the lessee grant over his term, and
afterwards the lessor make a feoffment in fee
of the land to a stranger, the second lessee
may have this writ: and the writ shall
be.

*Quare deforc' præfat' B. unum messuag',
&c. quod R. (cui L. illud dimisit ad ter-
minum qui nondum præteriit,) eidem B. dimisit
ad eundem terminum, &c.*

F. N. B. 198.
D.

So if four let a house to A. for
years, who granteth over his estate to B.
and

and afterwards two of the lessors die, and the survivors make a feoffment to C. in fee; B. may have a *quare ejecit infra terminum* against the feoffee; but the writ must recite the special matter.

And if a man lease land for years, and the lessor suffer a recovery to be had against him upon a feigned title, and the recoverer entereth, yet it seemeth that the lessee shall have this writ: and in such case, the words of the writ are, "*occasione cuius venditionis*," and yet the same is not properly a sale. Those words are only words of form. Id. 198. B.

Before the statute of 21 H. 8. c. 15. it seems that the tenant for years could not have falsified the recovery against his lessor: the reason is that, at the common law, terms for years were only small interests, being generally from year to year; and termors were looked on, merely as bailiffs to the freeholders. These terms were only on contract, and if the termors were ejected, they only had remedy, on their covenants, against their lessors. The statute of *Westm. 2.* which permitted the *quare ejecit infra terminum*, was the first statute which gave them remedy, against their lessors, by a judgment to recover the term; for the ejectment was only

Co. Lit. 46.

a.

2 Inst. 321,

Ec. but see

Plowd. 83.

only in the nature of an action of trespass, which gave them remedy in damages only, until 11 Hen. 7. when the *habere facias* began to be allowed. But though the writ of *quare ejecit infra terminum*, was established as a remedy, in the cases before mentioned, not only against the lessors, but against any person colluding with them, yet the lessees had no remedy against RECOVERERS at the common law, because they were not parties to the writ: (for no one was made party to the writ but who had a tenement interest,) and not being parties, they could not be received to plead. To help this, the statute of *Glocester*, (c. 11.) provides, that "the termor shall make himself party to the writ, on the default of the tenant, and shall be received to defend the title of the lessor, if he come in before judgment". This was not by any mean, a compleat remedy, for still if the lessor suffered a recovery by a feigned title, there was a record against the termor, which he could not traverse; therefore his title was destroyed, and he had remedy only in damages, on his covenants. To remedy so great an inconvenience, the statute of 21 H.8. c. 15. was made; and from thenceforth, if in this action the lessor had set up a feigned title by recovery against the lessee,

THAT

EJECTMENT.

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THAT did not destroy his action, and turn him round to a writ of covenant; but he might reply to such recovery, if it were pleaded in bar, and shew that it was effected by collusion; and if it was given in evidence, he might shew it was by collusion: thus he could recover the term itself, notwithstanding a collusive recovery.

And if a man lease lands for a term of years, and afterwards die without heir, and the lord by escheat enters and puts out the termor, it is a doubt whether he shall have a *quare ejecit infra terminum*, against the lord by escheat; yet it seemeth reasonable that he should. The reason is, that the lord, by granting the estate to the tenant in fee-simple, granted him full power to alien or charge the estate; and where such estate escheats to the lord charged with a lease, it is only an escheat of the reversion upon that lease: for the power of alienation, which was given by infeudation, extends to all acts EXECUTED upon the estate; because such acts are *in tanto* an alienation. It does not, however, extend to such as are not actually executed; for there the lord comes in by title paramount: and the estate can never be charged in the hands of the lord, by any act of the feudatory, unless it take place in the time

F. N. B. 198.
F.

of

of such feudatory, whereby the power of alienation is actually executed. Therefore, a statute staple or merchant, &c. shall not bind the lord by escheat, unless the land be actually extended.

F.N.B. 198.

G.

Co. Lit. 118.

a.

And so if a villain had leased land for years, and afterwards the lord of the villain had entered, and put out the termor, the lessee might have had this writ: because the villain was FREE, as to every body but his lord, and therefore if he had leased land, before the entry of the lord, the lessee had title. The reason was, that the lord gained title by entry, and until then the property was in the villain; for the villain having taken the estate by livery of seisin *coram paribus*, the lord could not take it from him but by entry: therefore if the villain had entered before the lord's entry, the lord could not have entered on the estate, because he could not enter on the property of a freeman. He could not therefore in this case have entered upon the lessee for years, in order to eject him: but it seems he might have entered to claim his reversion, which was still in his villain.

Co. Lit. 119.

a.

F.N.B. 198.

G.

And so if a man lease land for years, and afterwards a stranger puts out the lessee, and disseiseth the lessor, and afterwards the lessor

EJECTMENT.

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lessor releaseth to him, it seemeth that the lessee shall have the writ of *quare ejecit infra terminum*, against the disseisor, &c.

And it lies as well against the lessor, as against his feoffee. Yet the sale supposed in the writ is not traversable, but only the ejectment, &c. And if so, then it seemeth that the writ lieth against the lord by *escheat*, or against the lord of the villain, who putteth out the termor, &c.

F.N.B. 198.

I.

F.N.B. 198.

K.

But an *ejectione firme* lay against the lord of the villain, if he had put the termor out of his lease, made by the villain, before entry made by the lord into the land. And so an *ejectione firme* lieth against the lord by *escheat*, if he oust the termor of the lease made by the tenant, &c.

F.N.B. ib.

And by the book of 19 H. 6. it appeareth, that it is in the election of the lessee to sue a writ of *ejectione firme*, or a writ of *quare ejecit infra terminum*, against the lessor, or his heir, or against the lord by *escheat*, or against the lord of the villain, if they put the termor out of his term, &c.

F.N.B. 198.

K. 221.

It is plain therefore that the *quare ejecit infra terminum* lies not only against the lessor himself, but against his feoffee, or any person who cometh in, in the per-
for

for they ought not to oust the lessees who hold of them, having only the reversion in themselves. And as tenant for life might have a writ of entry against his lessor, or the reversioner, if he disseised him; so this writ was formed, in similitude, that the tenant for years might have remedy, if the lessor ejected him. It was the rather formed in this case, because if no special writ had been formed, the tenant would have had no specific remedy to recover the land itself. The action of covenant indeed, would have run with the land, if the lessor had covenanted for himself, his heirs and assigns; and therefore the remainder ought to go to the feoffee; because after the lease made, the conveyance of the lessor amounted in truth to no more than a grant of the reversion, of consequence the feoffee coming into the same reversion, ought to be liable to the same action. The same law must govern touching the lord by escheat; he coming in by escheat to the reversion, and not to the possession itself.

All these nice distinctions, as to this ancient writ, are now of little consequence, inasmuch as since the introduction of fictitious ousters, by which the title may be tried against any kind of tenant, by whatever means he acquired the possession, the writ of *quare ejecit infra terminum* is fallen into disuse.

A P P E N -

A P P E N D I X.

No. I.

T H E

S T A T U T E S

R E L A T I V E T O

E J E C T M E N T S.

BY statute 21 Jac. I. c. 16. entitled "*an act for limitation of actions, and for avoiding suits in law,*" it is enacted that "no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments, now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued: and that no person or persons shall at any time hereafter make any entry, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made."

"Provided nevertheless, that if any person or persons, that is or shall be entitled

N

"to

" to such writ or writs, or that hath or shall
 " have such right or title of entry, be or
 " shall be, at the time of the said right or
 " title first descended, accrued, come, or
 " fallen, within the age of one and twenty
 " years, feme covert, *non compos mentis*, im-
 " prisoned, or beyond the seas, that then
 " such person and persons, his and their
 " heir and heirs, shall or may, notwithstand-
 " ing the said twenty years be expired,
 " bring his action, or make his entry, as
 " he might have done before this act; so
 " as such person and persons, or his or
 " their heir and heirs, shall within TEN
 " years next after his and their full age,
 " discoverture, coming of sound mind, en-
 " largement out of prison, or coming into
 " this realm, or death, take benefit of and
 " sue forth the same."

By statute 16 & 17 Car. 2. c. 3. entitled
 " an act to prevent arresting judgments and
 " superseding executions," reciting that "great
 " delay, trouble and vexation hath been
 " and still is occasioned to the people of
 " this realm, as well by arresting and re-
 " versing of judgments, as by staying exe-
 " cutions by writs of error and superseas:"
 it is enacted that "in writs of error to be
 " brought upon any judgment after verdict
 " in any action of *ejectione firmæ*, no exe-
 " cution

" cution shall be thereupon or thereby stayed,
 " unless the plaintiff or plaintiffs in such writ
 " of error shall be bound unto the plaintiff in
 " such action of *ejectione firmæ*, in such rea-
 " sonable sum, as the court, to which such
 " writ of error shall be directed, shall think
 " fit; with condition, that if the judg-
 " ment shall be affirmed, or that the writ
 " of error be discontinued, or that the said
 " plaintiff or plaintiffs be nonsuit in such
 " writ of error, that then the said plaintiff
 " or plaintiffs shall pay such costs, damages,
 " and sum and sums of money, as shall be
 " awarded upon or after such judgment af-
 " firmed, discontinuance or nonsuit had."—

" And to the end that the same may be
 " ascertained, it is further enacted, That
 " the court wherein such execution ought
 " to be granted upon such affirmation, dis-
 " continuance, or nonsuit, shall issue a writ
 " to enquire as well of the mesne profits
 " as of the damages by any waste com-
 " mitted after the first judgment in *ejectione*
 " *firmæ*; and upon the return thereof,
 " judgment shall be given, and execution
 " awarded for such mesne profits and da-
 " mages, and also for costs of suit."

This act is made perpetual by 22 and 23
 Car. 2. c. 4.

A P P E N D I X.

By stat. 4 Geo. 2. c. 28. entitled, "*An act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, and renewal of leases,*" reciting, That "great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties that attend the re-entries at common law;" and that, "when a legal re-entry is made, the landlord or lessor must be at the expence, charge, and delay, of recovering in ejectment, before he can obtain the actual possession of the demised premises;" and that "it often happens that after such a re-entry made, the lessee, or his assignee, upon one or more bills filed in a court of equity, not only holds out the lessor or landlord by an injunction, from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur;" it is enacted, That "in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof,

“thereof, such landlord or lessor shall and
“may, without any formal demand or re-
“entry, serve a declaration in ejectment
“for the recovery of the demised premises,
“or in case the same cannot be legally
“served, or no tenant be in actual possession
“of the premises, then to affix the same
“upon the door of any demised mes-
“suage; or in case such ejectment shall
“not be for the recovery of any messuage,
“then upon some notorious place of the
“lands, tenements, or hereditaments, com-
“prised in such declaration in ejectment;
“and such affixing shall be deemed legal
“service thereof: which service or affixing
“such declaration in ejectment, shall stand
“in the place and stead of a demand and
“re-entry; and in case of judgment against
“the casual ejector, or nonsuit for not
“confessing lease entry and ouster, it shall
“be made to appear to the court where
“the said suit is depending, by affidavit,
“or be proved upon the trial, in case
“the defendant appears, that half a year’s
“rent was due before the said declaration
“was served, and that no sufficient distress
“was to be found on the demised premises,
“countervailing the arrears then due, and
“that the lessor in ejectment had power to
“re-enter; then, and in every such case,

" the lessor in ejectment shall recover judg-
 " ment and execution, in the same manner
 " as if the rent in arrear had been legally
 " demanded, and a re-entry made; and in
 " case the lessee, or other person claiming
 " under the said leases, shall permit judg-
 " ment to be recovered on such ejectment,
 " and execution to be executed thereon,
 " without paying the rent and arrears, toge-
 " ther with full costs, and without filing any
 " bill for relief in equity, within six ca-
 " lendar months after such execution exe-
 " cuted; then and in such case, the lessee, and
 " all other persons claiming under the lease,
 " shall be barred from all relief in law or
 " equity, other than by writ of error, for
 " reversal of such judgment, in case the
 " same shall be erroneous; and the said
 " landlord or lessor shall from thenceforth
 " hold the demised premises discharged
 " from such lease; and if on such ejectment
 " verdict shall pass for the defendant, or
 " the plaintiff shall be non-suited therein,
 " except for the defendant's not confessing
 " lease entry and ouster, then in every
 " such case, such defendant shall recover
 " full costs. Provided always, that nothing
 " herein contained shall extend to bar the
 " right of any mortgagee of such lease,
 " or any part thereof, who shall not be in
 " pos-

possession, so as such mortgagee shall
and do, within six calendar months after
such judgment obtained, and execution
executed, pay all rent in arrear, and all
costs and damages sustained by such lessor,
person or persons entitled to the remainder
or reversion as aforesaid, and perform all
the covenants and agreements, which on
the part and behalf of the first lessee
ought to be performed."

"And in case the lessee, or other per-
son, claiming any right, title, or interest,
in law or equity, of, in, or to the lease,
shall, within the time aforesaid, file one
or more bill or bills, for relief in any
court of equity, such person shall not
have any injunction, against the pro-
ceedings at law on such ejectment, unless
he do or shall, within forty days next
after a full and perfect answer by the
lessor of the plaintiff in such ejectment,
bring into court, and lodge with the
proper officer, such sum of money as the
lessor of the plaintiff in the said ejectment
shall, in his answer, swear to, be due and
in arrear, over and above all just allow-
ances, and also the costs taxed in the said
suit; there to remain till the hearing of
the cause, or to be paid out to the lessor
or landlord on good security, subject to

" the decree of the court; and in case such
 " bill or bills shall be filed within the
 " time aforesaid, and after execution is exe-
 " cuted, the lessor of the plaintiff shall be
 " accountable only for so much and no
 " more as he shall really, without fraud,
 " deceit, or wilful neglect, make of the
 " demised premises from the time of his
 " entering into the actual possession thereof;
 " and if what shall be so made by the
 " lessor of the plaintiff, happen to be less
 " than the rent reserved on the lease, then
 " the lessee, before he shall be restored to
 " possession, shall pay such lessor or land-
 " lord what the money, so by them made,
 " fell short of the reserved rent."

" And that if the tenant, or his assignee,
 " shall, at any time before the trial in such
 " ejectment, pay or tender to the lessor or
 " landlord, his executors or administrators,
 " or his, her, or their attorney in that
 " cause, or pay into the court where the
 " same cause is depending, all the rent and
 " arrears, together with the costs, then
 " and in such case, all further proceedings
 " on the ejectment shall cease; and if such
 " lessee, his, her, or their executors, ad-
 " ministrators, or assigns, shall, upon such
 " bill filed as aforesaid, be relieved in
 " equity, he, she, and they, shall have,
 " hold,"

“hold, and enjoy, the demised lands, ac-
 “cording to the lease thereof made, with-
 “any new lease to be thereof made to him,
 “her, or them.”

By statute 11 Geo. 2. c. 19. intituled, “*An*
 “*act for the more effectual securing the pay-*
 “*ment of rents, and preventing frauds by*
 “*tenants,*”—reciting, that “great inconve-
 “niences have frequently happened to land-
 “lords by their tenants secreting declara-
 “tions in ejectment which have been
 “delivered to them, or by refusing to ap-
 “pear to such ejectments, or to suffer their
 “landlords to take upon them the defence
 “thereof;” it is enacted, that “every
 “tenant to whom any declaration in eject-
 “ment shall be delivered for any lands,
 “tenements, or hereditaments, in that
 “part of Great Britain called England,
 “dominion of Wales, or town of Berwick
 “upon Tweed, shall forthwith give notice
 “thereof to his or her landlord, or his,
 “her, or their bailiff or receiver, under
 “penalty of forfeiting the value of three
 “years improved or rack-rent of the pre-
 “mises so demised or holden in the posses-
 “sion of such tenant, to the person of
 “whom he or she holds, to be recovered
 “by action of debt.”

“And that it shall and may be lawful
 “for the court where such ejectment shall
 “be

"be brought, to suffer the landlord to
 "make himself defendant, by joining with
 "the tenant to, whom such declaration in
 "ejectment shall be delivered, in case he shall
 "appear, but in case such tenant shall refuse
 "or neglect to appear, judgment shall be
 "signed against the casual ejector for
 "want of such appearance; but if the
 "landlord of any part of the lands, tene-
 "ments, or hereditaments, for which such
 "ejectment was brought, shall desire to ap-
 "pear by himself, and consent to enter into
 "the like rule that by the course of the
 "court the tenant in possession, in case he
 "or she had appeared, ought to have done;
 "then the court where such ejectment shall
 "be brought, shall and may permit such
 "landlord so to do, and order a stay of
 "execution upon such judgment against
 "the casual ejector, until they shall make
 "further order therein."

No. II.

*A lease in ejectment, where the premises
 are not inhabited; to recover the pos-
 session.*

THIS indenture made the 17th day of
 May, in the 19th year of the reign of our
 sovereign lord George the third, by the grace
 of

of God, of Great Britain, France, and Ireland,
king, defender of the faith, &c. and in
the year of our Lord, 1780. Between *John
Andrews*, of, &c. of the one part, and *John
Lilly*, of, &c. of the other part, witnesseth,
that he the said *John Andrews*, for divers
good causes and considerations him there-
unto moving, hath demised granted and to
farm letten, and by these presents doth
demise grant and to farm let unto the
said *John Lilly*, all that his messuage or
tenement commonly called or known by
the name of, &c. situate lying and being
in *Street*, in the parish of, &c. in
the county of, &c. and late in the possession
of one *Henry Duncomb*; to have and to
hold the said messuage or tenement, with
the appurtenances, from the date of these
presents, for and during, and until the full end
and term, of five years from thence next en-
suing, and fully to be compleat and ended;
provided always, and upon condition, that
if the said *John Andrews*, his executors or ad-
ministrators, shall, at any time after the 30th
day of this present month of *May*, tender
to the said *John Lilly*, his executors or ad-
ministrators, one shilling, then this pre-
sent indenture, and every thing therein
contained, shall be void and of none effect;
any thing herein contained to the contrary
in

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in any wise notwithstanding. In witness whereof the said parties to these presents have hereto interchangeably set their hands and seals the day and year first above written.

Sealed and delivered,
being first duly stamped,
in the presence of;

N. B. This deed requires a 5s. stamp.

No. III.

Proceedings on an action of trespass in ejection, by original, in the King's Bench.

§ 1. *The original writ.*

GEORGE the second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the sheriff of *Berkshire*, greeting. If *Richard Smith* shall give you security of prosecuting his claim, then put by gage and safe pledges *William Stiles*, late of *Newbury*, gentleman, so that he be before us on the morrow of *All-souls*, wheresoever we shall then be in *England*, to shew wherefore with force and arms he entered into one messuage, with the appurtenances, in
Sutton,

Sutton, which *John Rogers*, esquire, hath demised to the aforesaid *Richard*, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said *Richard*, and against our peace. And have you there the names of the pledges, and this writ. Witness ourself at *Westminster*, the twelfth day of *October*, in the twenty-ninth year of our reign.

Pledges of prosecution, { *John Doe*,
 Richard Roe, Sheriff's return.

The within named *William Stiles* is attached } *John Den*,
by pledges, *Richard Fen*.

§ 2. *The declaration against the casual ejector; who gives notice thereupon to the tenant in possession. By original in K. B. **

Michaelmas, the 29th of king *George* the second.

Berks, *WILLIAM Stiles*, late of *Newbury* in the said county, gentleman, was attached to answer *Richard Smith*, of a plea, wherefore with force and

* The proceedings in ejectment in the *Common Pleas*, and, by original, in the *King's Bench*, are exactly alike; *mutatis mutandis*.

arms,

arms he entered into one messuage, with the appurtenances, in *Sutton* in the county aforesaid, which *John Rogers* esquire demised to the said *Richard Smith* for a term which is not expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said *Richard*, and against the peace of the lord the king, &c. And whereupon the said *Richard* by *Robert Martin* his attorney complains, that whereas the said *John Rogers* on the first day of *October*, in the twenty-ninth year of the reign of the lord the king that now is, at *Sutton* aforesaid, had demised to the same *Richard* the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said *Richard* and his assigns, from the feast of *Saint Michael the Archangel* then last past, to the end and term of five years from then next following and fully to be complete and ended, by virtue of which demise the said *Richard* entered into the said tenement, with the appurtenances, and was thereof possessed; and, the said *Richard* being so possessed thereof, the said *William* afterwards, that is to say, on the said first day of *October*, in the said 29th year, with force of arms, that is to say, with swords, staves, and knives, entered into the said tenement,

tenement, with the appurtenances, which the said *John Rogers* demised to the said *Richard* in form aforesaid for the term aforesaid which is not yet expired, and ejected the said *Richard* out of the said farm, and other wrongs to him did, to the great damage of the said *Richard*, and against the peace of the said lord the king, whereby the said *Richard* saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings his suit, &c.

Mr. *George Saunders*,

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next *Hilary* term in his majesty's court of *King's Bench* WHERESOEVER, &c. by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Notice
thereto.

Your loving friend

William Stiles.

§. 3. *Declaration in ejectment by bill.**Middlesex; ff.*

A. B. complains of C. D. being in the custody of the marshal of the *Marshalsea* of our sovereign lord the king, before the king himself, for that whereas E. T. gentleman, on the tenth day of *May*, in the fifth year of the reign of our lord the now king, at *Westminster*, in the county of *Middlesex*, had demised, granted, and to farm let to the said A. five messuages, &c. (*residing the several parcels*) with the appurtenances, situate, lying, and being in the parish of *St. Martin's in the Fields*, in the said county of *Middlesex*, to have and to hold the said tenements, with the appurtenances, to the said A. and his assigns, from the 25th day of *March* then last past, to the full end and term of five years from thence next ensuing, and fully to be compleat and ended; by virtue of which said demise, he the said A. entered into the said tenements, with the appurtenances, and was thereof possessed until the said C. afterwards, that is to say, on the same tenth day of *May*, in the sixth year aforesaid, with force and arms, entered into the said tenements, with the appurtenances, which the said

E. T.

E. T. demised to the said A. in manner
afore said, for the term afore said, which is
not yet expired, and ejected the said A.
out of his said farm; and then and there
did other injuries to the said A. against
the peace of our said lord the king, and
to the damage of him the said A. of twenty
pounds, and thereupon he brings his suit,

Pledges to prosecute, { John Doe,
Richard Roe.

The notice to this declaration, is the same
as the last; only instead of the words,
"whosoever, &c." must be substituted,
"villain of *Westminster*."

4. Declaration in ejectment, by original, on
a double demise.

Leinshire. THOMAS Williamson, late
of *Et.* yeoman, was at-
tached to answer William Thomason, of a
plea wherefore, with force of arms, he en-
tered into one moiety of the manor of
Britherton, otherwise *Britherton*, with the
appurtenances, and into thirty messuages,
seven cottages, four hundred acres of land,
two hundred acres of meadow, and two
hundred acres of pasture, with the appur-
tenances,

tenances, in *Bratherton*, otherwise *Brotherton*, in the county of *Lancaster* aforesaid, which *James* duke of *Atbol* demised to the said *William* for a term which is not yet expired; and also into one other moiety of the manor of *Bratherton*, otherwise *Brotherton*, with the appertenances, and into thirty other messuages, ten other cottages, four hundred other acres of land, two hundred other acres of meadow, and two hundred other acres of pasture, with the appertenances in *Bratherton*, otherwise *Brotherton* aforesaid, in the county of *Lancaster* aforesaid, which *George Bruce* esquire demised to the said *William* for a term which is not yet expired; and ejected the said *William* from his said several farms, and other wrongs to him did, to the great damage of the said *William*, and against the peace of our sovereign lord the king, &c. And thereupon the said *William*, by *John Howard* his attorney, complains, that whereas the said duke, on the day of in the year of the reign of his present majesty, at *Preston* in the county aforesaid, had demised to the said *William* the said moiety and tenements first above-mentioned, with the appertenances; to have and to hold the same moiety and tenements, with the appertenances, to the said *William* and his assigns, from

from the day of then last
past to the full end and term of five years
from thence next ensuing, and fully to be
compleat and ended: by virtue of which
demise the said *William* entered into the
same moiety and tenements, with the ap-
pertenances, and was thereof possessed: and,
the said *William* being so possessed thereof,
the said *Thomas* afterwards, two wit, on the
said day of [the first day]
in the said year, with force and arms,
entered into the moiety and tenements first
above-mentioned, with the appertenances,
which the said duke demised to the said
William in manner aforesaid, for the term
aforesaid, which is not yet expired; and
ejected the said *William* out of the said
first above-mentioned farm. And also that
whereas the said *George Bruce* esquire, on
the day of in the
year aforesaid, at *Preston* aforesaid, had de-
mised to the said *William* the said moiety
and tenements secondly above-mentioned,
with the appertenances; to have and to
hold the same moiety and tenements, with the
appertenances, to the said *William* and his
assigns, from the day of
then last past, to the full end and term of
five years from thence next ensuing, and
fully to be compleat and ended: by virtue

of which last-mentioned demise, the said *William* entered into the same moiety and tenements, with the appertinances, and was thereof possessed: and the said *William* being so possessed thereof, the said *Thomas* afterwards, to wit, on the said day of [the first day in this count] in the said year, with force and arms, entered into the said moiety and tenements lastly above-mentioned, with the appertinances, which the said *George Bruce* esquire demised to the said *William* in manner aforesaid, for the term aforesaid, which is not yet expired; and ejected the said *William* out of his said last-mentioned farm, and other wrongs to him did, to the great damage of the said *William*, and against the peace of our said sovereign lord the king, &c.: whereupon the said *William* says he is injured, and has sustained damage to the value of forty pounds; and therefore he brings his suit, &c.

N. B. The declaration, by *bill*, on a double demise, is in *substance* the same as the count part of the declaration by *original*; and the only difference in *form* is that which exists between a declaration by *original* and a declaration by *bill*, on a single demise.—The notice must be the same, as that in page 191.

APPENDIX

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No. IV.

§ 1. *Affidavit of service of declaration, where there is but one tenant.*

In the King's Bench.

Between { A. B. on demise of C. D. plaintiff
and
E. F. = defendant.

S. S. of, &c. maketh oath, and saith that he this deponent did, on the day of last, deliver a true copy of the declaration and notice hereunto annexed, to W. T. tenant in possession of the premises in the said declaration mentioned; and, at the same time, told him it was a declaration in ejectment, and that unless he did appear thereunto, by some attorney of this honourable court, on the first day of this present term, judgment would be entered against the said defendant by default, and he the said W. T. would be turned out of possession: or words to that or the like effect.

Sworn, &c.

S. S.

§ 2. *Similar affidavit, where there are several tenants.*

S. S. of, &c. maketh oath, and saith that he this deponent did, on, &c. last, deliver a true copy of the declaration and

notice

notice hereunto annexed, to *W. T.* tenant in possession of part of the premises in the said declaration mentioned; and did also, on the same day, deliver another copy of the said declaration and notice, to *D.* the wife of *I. T.* tenant in possession of the residue of the premises in the said declaration mentioned. And this deponent further saith that he told them *severally*, that it was a declaration in ejectment, and that unless they did *severally* appear thereto, by some attorney of this honourable court, on the first day of this present term, judgment would be entered against the said defendant by default, and they the said *W. T.* and *I. T.* would be *severally* turned out of possession: or words to that or the like effect.

Sworn, &c.

S. S.

§ 3. *Affidavit of service of declaration, where the tenant's wife refused to open the door.*

S. S. of, &c. maketh oath, and saith that he this deponent, on the day of last, went to the messuage of *W. T.* situate at, &c. being the messuage in question in this cause; and that *M.* the wife of the said *W. T.* refused to open the door of the said

said messuage, but spoke through the wicket of the said door. And this deponent further saith that he did thereupon shew to the said M. a true copy of the declaration and notice hereunto annexed, and acquainted her with the contents thereof; but that as soon as he had so done, the said M. shut the said wicket, and refused to take the said declaration or notice. And this deponent further saith that, not being able to deliver the same, he affixed the said declaration and notice on the door of the said messuage; and that the said W. T. on the same day acknowledged that he had received the same.

Sworn, &c. S. S.

§ 4. Affidavit of the tenant's refusing to defend an ejector, in order to have the landlord admitted defendant.

S. S. of &c. maketh oath, and saith that he this deponent, did on, &c. last, by the direction of A. B. landlord of the premises in question in this cause, apply to W. T. the tenant in possession of the same premises, to know whether he the said W. T. would appear and become defendant in this cause, or would permit the said A. B. to defend his title to the said premises,

misses, in the name of the said *W. T.* and this deponent, at the same time, shewed and offered to deliver to the said *W. T.* a note, signed by the said *A. B.* whereby the said *A. B.* promised to defend and keep the said *W. T.* harmless, of from and against all costs and charges in this cause. And this deponent further saith, that the said *W. T.* told him, in answer, that he would not appear and become defendant in this cause or any ways concern himself therein.

Sworn, &c.

S: S:

No. V.

§ 1. *The common rule of court.*

Hilary term, the twenty-ninth year of king George the second.

Smith against
Stiles; for one
messuage
with appur-
tenances in
Sutton, on
the demise of
John Rogers.

Berks, **I**T is ordered by the court, by the
to wit, assent of both parties, and their
attornies, that *George Saunders*, gentleman,
may be made defendant, in the place of the
now defendant *William Stiles*, and shall im-
mediately appear to the plaintiff's action,
and shall receive a declaration in a plea of
trespass and ejectment of the tenements in
question, and shall immediately plead there-
to, not guilty: and, upon the trial of the
issue,

issue, shall confess lease, entry, and ouster, and insist upon his title only. And if, upon trial of the issue, the said George do not confess lease, entry, and ouster, and by reason thereof the plaintiff cannot prosecute his writ, then the taxation of costs upon such *nonpross.* shall cease, and the said George shall pay such costs to the plaintiff, as by the court of our lord the king here shall be taxed and adjudged for such his default in non-performance of this rule; and judgment shall be entered against the said *William Stiles*, now the casual ejector, by default. And it is further ordered, that, if upon trial of the said issue a verdict shall be given for the defendant, or if the plaintiff shall not prosecute his writ, upon any other cause, than for the not confessing lease, entry, and ouster as aforesaid, then the lessor of the plaintiff shall pay costs, if the plaintiff himself doth not pay them.

By the court.

When the proceedings are by *bill*, and not by *original*, the words *and file common bail* should be inserted after the words, requiring the tenant's appearance; and the word *bill* should stand in the room of the word *writ*, throughout.

§. 2. *The rule as formerly drawn up, in the King's Bench.*

Michaelmas term, in the sixth year of the reign of king *George* the second.

Bohun Inst.
leg. 111,

Surry. **I**T is ordered, by the consent of the attorneys for both parties, that *C. D.* be admitted defendant instead of the now defendant *T. P.*; and that he forthwith appear at the suit of the plaintiff, and file common bail, and receive a declaration in a plea of trespass and ejectment for the tenements in question, and forthwith plead thereunto not guilty; and that upon the trial of the issue, he confess lease, entry, and ouster, and insist upon the title only, otherwise let judgment be entered by the plaintiff against the now defendant *T.* by default; and if upon the trial of the said issue the said *C. D.* shall not confess lease, entry, and ouster, by which the plaintiff shall not be able further to prosecute his bill against the said *C.* then no costs or charges shall be awarded upon such nonsuit, but the said *C.* shall pay to the plaintiff the costs and charges thereupon to be taxed: And it is further ordered that if upon the trial of the said issue a verdict shall be given for the said (defendant,) or if it shall happen the plaintiff shall not further prosecute his
said

said bill for any other cause, than for not confessing lease, entry and actual ouster afore-
said, that then the plaintiff's lessor shall pay
to the said C. his costs and charges in that
case to be adjudged, &c.

*§ 3. The rule as formerly drawn up, in
the Common Pleas.*

Hilary term, the fifth of king George the
second.

Norfolk. **I**T is ordered by the consent of
Robert Martin the plaintiff's at-
torney, and John Cock, attorney for A. B.
who claims a title to the tenements in que-
stion, that the said A. B. be admitted defend-
ant, and that the said A. shall immediately
appear by his said attorney, who shall re-
ceive a declaration, and plead thereto the
general issue this term; and that the said
A. at the trial thereupon to be had, shall
appear in his proper person, either by his
council or attorney, and acknowledge lease,
entry, and actual ouster, of such of the
tenements specified in the said declaration,
as are in the possession of the said defend-
ant, or his under tenant, or any per-
son claiming by or under his title
thereto, or that in default thereof, judg-
ment shall be entered against the said
defendant as the casual ejector; but the
pro-

proceedings to stay against him until there be a default in some of the premises: and by the like consent it is ordered, that if by reason of such default the plaintiff become nonsuited at the trial, the said *A.* shall take no advantage thereof, but shall pay costs for the same to the said plaintiff, to be taxed by the prothonotary. And it is further ordered, that the lessor of the plaintiff be chargeable with the payment of such costs, as shall be allowed and awarded by this court to the said *A.* in any manner howsoever.

No. VI.

The record.

Pleas before the lord the king at *Westminster*, of the term of *Saint Hilary*, in the twentieth year of the reign of the lord *George* the second by the grace of *God* of *Great Britain, France, and Ireland*, king, defender, of the faith, &c.

Berks, **G**EOERGE *Saunders*, late of *Sutton* to wit. in the county aforesaid, gentleman, was attached to answer *Richard Smith*, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in *Sutton*, which *John Rogers* esquire, hath demised to the said *Richard* for a term which is not yet expired, and ejected him from his said farm, and other wrongs

wrongs to him did, to the great damage of the said *Richard*, and against the peace of the lord the king that now is. And whereupon the said *Richard*, by *Robert Martin* his attorney complains, that whereas the said *John Rogers* on the first day of *October* in the twenty-ninth year of the reign of the lord the king that now is, at *Sutton* aforesaid, had demised to the same *Richard* the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said *Richard* and his assigns, from the feast of *Saint Michael the Archangel* then last past, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demise the said *Richard* entered into the said tenement, with the appurtenances, and was thereof possessed: and, the said *Richard* being so possessed thereof, the said *George* afterwards, that is to say, on the first day of *October*, in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said *John Rogers* demised to the said *Richard* in form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *Richard* out of his said farm, and other wrongs to him did,

Declaration,
or count.

Defence.

Plea, not
guilty.

Issue.

Venire a-
warded.

Respite, for
default of
jurors.

did, to the great damage of the said *Richard*, and against the peace of the said lord the king; whereby the said *Richard* saith that he is injured and endamaged to the value of twenty pounds: and thereupon he brings suit, [and good proof.] And the aforesaid *George Saunders*, by *Charles Newman* his attorney, comes and defends the force and injury, when [and where it shall behove him;] and saith that he is in no wise guilty of the trespass and ejectment aforesaid, as the said *Richard* above complains against him; and thereof he puts himself upon the country: and the said *Richard* doth likewise the same; therefore let a jury come thereupon before the lord the king, on the octave of the purification of the blessed virgin *Mary*, wheresoever he shall then be in *England*; who neither [are of kin to the said *Richard*, nor to the said *George*;] to recognize [whether the said *George* be guilty of the trespass and ejectment aforesaid:] because as well [the said *George*, as the said *Richard*, between whom the said difference is, have put themselves on the said jury.] The same day is there given to the parties aforesaid. Afterwards the process therein, being continued between the said parties of the plea aforesaid by the jury, is put between them in respite, before the lord the king, until

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until the day of *Easter* in fifteen days, where-
 soever the said lord the king shall then be
 in *England*; unless the justices of the lord
 the king assigned to take assizes in the
 county aforesaid, shall have come before
 that time, to wit, on *Monday* the eighth
 day of *March*, at *Reading* in the said county
 by the form of the statute [in that case pro-
 vided,] by reason of the default of the ju-
 rors, [summoned to appear as aforesaid.] At
 which day before the lord the king, at *West-*
minster, come the parties aforesaid by their
 attornies aforesaid; and the aforesaid justices
 of a lize, before whom [the jury aforesaid
 came,] sent here their record before them had
 in these words, to wit; afterwards at the day
 and place within contained, before *Heneage*
Legge, esquire, one of the barons of the
Exchequer of the lord the king; and sir *John*
Eardley Wilmot, knight, one of the justices
 of the said lord the king, assigned to hold
 plea before the king himself, justices of the
 said lord the king, assigned to take assises in
 the county of *Berks* by the form of the sta-
 tute [in that case provided,] come as well
 the within named *Richard Smith*, as the
 within written *George Saunders*, by their at-
 tornies within contained; and the jurors of
 the jury whereof mention is within made
 being called, certain of them, to wit, *Charles*
Holloway

Nisi prius.

Postea.

Tales de circumstantibus.

Verdict for the plaintiff.

Holloway, John Hooke, Peter Graham, Henry Cox, William Brown, and Francis Oakley, come, and are sworn upon that jury: and because the rest of the jurors of the same jury did not appear, therefore others of the by-standers being chosen by the sheriff, at the request of the said *Richard Smith*, and by the command of the justices aforesaid, are appointed anew, whose names are annexed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed a-new, to wit, *Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts, and Daniel Parker,* being likewise called, come; and together with the other jurors aforesaid before impanelled and sworn being elected, tried, and sworn, to speak the truth of the matter within contained, upon their oath say, that the aforesaid *George Saunders* is guilty of the trespass and ejectment within-written, in manner and form as the aforesaid *Richard Smith* within complains against him; and assess the damages of the said *Richard Smith*, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence: and, for those costs and charges, to forty shillings. Whereupon the said

Richard

Richard Smith, by his attorney aforesaid, prayeth judgment against the said *George Saunders*, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid: and the said *George Saunders*, by his attorney aforesaid, saith that the court here ought not to proceed to give judgment upon the said verdict, and prayeth that judgment against him the said *George Saunders*, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried anew by other jurors to be afresh impanelled. And, because the court of the lord the king here is not yet advised of giving their judgment of and upon the premisses, therefore day thereof is given as well to the said *Richard Smith* as to the said *George Saunders*, before the lord the king, until the morow of the Ascension of our Lord, wheresoever the said lord the king shall then be in *England*, to hear their judgment of and upon the premisses, for that the court of the lord the king is not yet advised thereof. At which day before the lord the king, at *Westminster*, come the parties aforesaid by their attornies aforesaid: upon which, the

Motion in
arrest of judgment.

Continuance.

P

record

Opinion of
the court.

Judgment for
the plaintiff.

Costs.

*Capiatur pro
fine.*

Writ of pos-
session,

record and matters aforesaid having been seen, and by the court of the lord the king now here fully understood, and all and singular the premisses having been examined, and mature deliberation being had thereupon, for that it seems to the court of the lord the king now here that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not be quashed, and that no new trial ought to be had of the issue aforesaid, therefore it is considered, that the said *Richard* do recover against the said *George* his term yet to come, of and in the said tenements, with the appurtenances, and the said damages assessed by the said jury in form aforesaid, and also twenty-seven pounds six shillings and eight pence for his costs and charges aforesaid, by the court of the lord the king here awarded to the said *Richard*, with his assent, by way of increase; which said damages in the whole amount to twenty-nine pounds, seven shillings and eight pence. And let the said *George* be taken, [until he maketh fine to the lord the king] And hereupon the said *Richard* by his attorney aforesaid prayeth a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid yet to come of and in the tenements aforesaid, with

with the appurtenances: and it is granted unto him, returnable before the lord the king on the morrow of the Holy Trinity, wherefoever he shall then be in *England*. At which day before the lord the king, at *Westminster*, cometh the said *Richard* by his attorney aforesaid; and the sheriff, that is to say, *for Thomas Reeve*, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the ninth day of *June* last past, did cause the said *Richard* to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, as he was commanded.

And return.

to return
the court

to return
the court

Court

Court
for
West of
Kiln

P 2

SPECIAL

in the year of the lord the king's reign, the said *Richard* was by the sheriff, that is to say, *for Thomas Reeve*, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the ninth day of *June* last past, did cause the said *Richard* to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, as he was commanded.

No. VII.

SPECIAL VERDICTS.
IN
EJECTMENT.

§ 1. *York v. Jordan.*

Not guilty.

Award of the
venire.

AND the said *John Jordan, John Mittel,*
and *Thomas,* by *J. W.* their attorney,
come and defend the force and injury,
when, &c. and plead, that they are in no
wise guilty of the trespass and ejectment
aforesaid, as the said *James* above com-
plaints against them; and thereof they put
themselves upon the country, and the said
James does likewise the same. Therefore
the sheriff is commanded, that he cause to
come hither, on the octave of the purifica-
tion of the blessed virgin *Mary,* twelve,
&c. By whom, &c. And who neither,
&c. To recognize, &c. Because as well,
&c. At which day the jury between the
said parties, in the said action, were re-
spited between them until this day (namely)
in fifteen days from the feast day of *Easter*
then next ensuing, unless his majesty's
justices assigned by virtue of the statute,
&c.

&c. to hold the assizes in the county afore-
 said, had come before, on *Monday* the
 twenty-first day of *March* then next ensuing,
 at *Maidstone* in the county aforesaid; and
 now here at this day, as well the said
James, as the said *John Jordan*, *John Mittel*,
 and *Thomas*, by their said attornies, ap-
 peared; and the said justices of assize
 before whom, &c. returned hither their
 record in these words: afterwards, at the
 day and place within contained, as well the
 within written *James York*, as the within writ-
 ten *John Jordan*, *John Mittel*, and *Thomas*,
 by their attornies within contained, came
 before Sir *John Holt*, knight, his majesty's
 chief justice assigned to hold pleas before the
 king himself, (*Eldred Lancelot Lee* being
 associated for this turn to the said sir *John*
Holt;) and sir *Edward Nevill*, knight, one of
 the justices of his said majesty's bench, and
 sir *Nicholas Lechmere*, knight, one of his
 majesty's barons of the exchequer, his ma-
 jesty's justices appointed to hold the assizes
 in the county of *Kent*, by virtue of the
 statute, &c. (the presence of the said *Edward*
Nevill and *Nicholas Lechmere* not being
 expected, by virtue of his majesty's writ
 of *fi non omnes*, &c.) and the jurors of the
 jury whereof mention is within made,
 being summoned, likewise appeared; who

Postea,

A P P E N D I X.

The estate
of Strongbill
Special Ver-
dict.

John Strong-
bill seised in
fee.

and devised
for a year

Made his
will.

And died
seised.

being chosen tried and sworn (to declare the truth of the within contents) declare, upon their oath, that long before the within written time when the within mentioned trespass and ejectment is within supposed to have been committed, one *John Strongbill* esquire was seised of the tenements with the appurtenances mentioned in the declaration within written (amongst other things) in his demesne as of fee, having issue *Henry* his son and heir apparent, mentioned in his last will; and being so thereof seised, on the 17th day of *June*, in the year of our Lord 1665, made his last will and testament in writing, and thereby gave and devised amongst other things, in the words following, to wit, [here was set forth the will, *in hac verba*, containing a devise to his son *Henry Strongbill* for life; remainder to the issue male of his said son, in tail]. As it doth, by the said last will produced in evidence to the jury aforesaid, more plainly appear: and the jurors aforesaid do upon their said oath farther declare, That the said *John Strongbill* afterwards (that is to say) on the first day of *September*, in the year of our Lord 1665, died seised of such his estate of and in the tenements aforesaid, with the appurtenances, (whereof the tenements aforesaid, mentioned in the said declaration, are

APPENDIX.

are parcel): after whose decease he the said *Henry Strongbill* entered into the said tenements with the appurtenances, (whereof the said tenements with the appurtenances, mentioned in the said declaration, are parcel,) and was seised thereof as the law requires: and the said jurors do upon their said oath further declare, That he the said *Henry Strongbill*, being seised as aforesaid, afterwards and before he had any issue of his body lawfully begotten, to wit, on the twenty-third day of *October*, in the year of our Lord 1676, by an indenture executed between the said *Henry Strongbill* of the one part, and *Thomas Short* and *William Norris* of *London*, gentlemen, of the other part, bearing date the same day and year, in consideration of five shillings mentioned in the indenture aforesaid, to be paid by the said *Thomas Short*, and *William Norris* to him the said *Henry Strongbill*, he, the said *Henry Strongbill*, demised to the said *Thomas Short* and *William Norris* the tenements aforesaid, mentioned in the said declaration, to have and to hold to the said *Thomas Short* and *William Norris*, from the day next before the day of the date of the indenture aforesaid, for one whole year from thence next ensuing; as it doth by the said indenture produced in evidence to

The estate descended to *Henry*, who entered and was seised,

and demised for a year,

and after-
wards releas-
ed to Short
and Norris.

to the use
of Judith
Stronghill
for life.

Remainder
to his own
right heirs.

the said jurors more fully appear by virtue whereof the said *Thomas Short* and *William Norris* entered into the tenements aforesaid with the appurtenances, and were thereof possessed for the term aforesaid, and being so possessed thereof, afterwards, to wit, on the twenty-fourth day of the same month of *October*, in the year last above mentioned, by an indenture *quadrupartite* made between him the said *Henry Strongbill* of the first part, the said *Thomas Short* and *William Norris* of the second part, *William Lowe*, of, &c. gentleman, of the third part, and *Judith Strongbill*, of, &c. of the fourth part, bearing date the same day and year, he the said *Henry Strongbill* granted, demised, released, quit-claimed, and confirmed, to the said *Thomas Short* and *William Norris* and their heirs, the tenements aforesaid with the appurtenances, mentioned in the declaration aforesaid, then being in their actual possession; to have and to hold to the said *Thomas Short* and *William Norris*, and their assigns, to the use of the said *Judith Strongbill* and her assigns, for and during the term of her natural life; and after the decease of the said *Judith*, to the use of the said *Henry Strongbill*, his heirs and assigns for ever: and the said jurors do, upon their said oath, further declare, that this following clause

choff, viz. contained in the said last-mentioned indenture, that is to say, [here was inserted, at length, a covenant to suffer a recovery to the uses of the lease and release,] as it doth by the said indenture, produced in evidence to the said jurors, more fully appear; by virtue of which indentures of lease and release last mentioned, she, the said *Judith*, entered into the said tenements with the appurtenances, mentioned in the said declaration, and was thereof possessed as the law requires. And the said jurors do upon their said oath further declare, that in pursuance of the said last-mentioned indenture, he, the said *William Lowe*, gentleman, on the twenty-third day of the same month of *October*, sued out of the court of *Chancery* of his late majesty *Charles the second*, late king of *England*, &c. against them the said *Thomas Short* and *William Norris*, his said majesty's writ of entry *sur disseisin in le post*, returnable before his said majesty's justices of the court of *Common Pleas* at *Westminster* in the county of *Middlesex*, on the morrow of *saint Martin* then next following, by which said writ he, the said *William Lowe*, demanded against the said *Thomas Short* and *William Norris* (amongst other things) the tenements aforesaid with the appurtenances, mentioned in the

Covenant to suffer a recovery.

Recovery accordingly.

to recover of Henry Highgate.

to the use of Judith Short for life.

Remains to his own right heirs.

Voucher of
Henry
Stronghill.

the declaration aforesaid, by the names of, &c. as his right and inheritance, and wherein they the said *Thomas Short* and *William Norris* had no entry, unless after a desceisin, which *Hugh Hunt* unjustly and without any judgment made thereon, to the said *William Lowe*, within thirty years, &c. and whereupon he declared that he was seised of the said tenements, with the appurtenances in his demesne, as fee of land right, in time of peace, in the reign of our late sovereign lord the king, by taking the profits to the value, &c. and into which, &c. and thereupon he brought his suit, &c. And the said *Thomas* and *William Norris* personally came and defended their right, when, &c. and called thereto to warranty the said *Henry Strongbill*, who was then personally present in court, and freely warranted to them the tenements aforesaid, with the appurtenances; and thereupon the said *William Lowe* demanded against the said *Henry Strongbill*, tenant by his warranty, the tenements aforesaid, with the appurtenances, in the manner aforesaid; and whereupon he declared he was seised of the tenements aforesaid, with the appurtenances, in his demesne, as of a fee and right, in time of peace, in the reign of our late lord the king, by taking the profits

to the value, &c. and into which, &c. and thereupon he brought his suit, &c. And the said *Henry*, tenant by his warranty, defended his right when, &c. and farther vouch- ed *John Wheeler* to warranty thereupon, who was likewise personally present in court, and freely warranted to him the tenements; with the appurtenances, &c. and thereupon the said *William Lowe* de- manded against the said *John Wheeler*, tenant by his warranty, the tenements afore- said with the appurtenances, in the manner aforesaid; and thereupon he declared that he himself was seised of the said tenements with the appurtenances, in his demesne as of fee and right, in time of peace, in the reign of our late lord the king, by taking the profits thereof to the value, &c. and into which, &c. and thereupon he brought his suit, &c. And the said *John Wheeler*, tenant by his warranty, defend- ed his right, when, &c. and pleaded, that the said *Hugh* had not disseised the said *William Lowe* of the tenements aforesaid, with the appurtenances, as he the said *William* had before supposed by his writ and declaration aforesaid; and thereof he put himself on the country, &c. and the said *William Lowe* craved leave to imparl thereto, and it was granted to him, &c.

Who vouches
over the com-
mon vouches.

And

Judgment
upon the re-
covery.

Award of the
writ of seisin.

Return.

And afterwards the said *William Lowe* came back again into the court, that same term, in his own person, and the said *John Wheeler*, although solemnly called, came not back, but departed in despite of the court, and made default; therefore it was adjudged, that the said *William Lowe* recover his seisin, against the said *Thomas* and *William Norris*, of the tenements aforesaid with the appurtenances; and that the said *Thomas* and *William Norris* should have of the land of the said *Henry* to the value, &c. and that the said *Henry* should have of the land of the said *John Wheeler* to the value, &c. and that the said *John Wheeler* should be amerced, &c. And thereupon the said *William Lowe* prayed a writ of our said sovereign lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid with the appurtenances, and it was granted to him, returnable forthwith, &c. Afterwards, to wit, on the twenty-eighth day of *November*, that same term, the said *William Lowe* came personally into court, and the sheriff, to wit, sir *John Cutler* knight and baronet, then returned, that he by virtue of the writ to him directed, on the twenty-third day of *November* then last past, caused the said *William Lowe* to have full seisin of the tene-

tenements aforesaid with the appurtenances, as by the writ he was commanded to do: and the said jurors do farther upon their said oath declare, that afterwards, to wit, on the first day of *May*, in the year of our Lord one thousand six hundred and seventy-eight, and not before, the said *Henry Strongbill* had issue of his body lawfully begotten, to wit, the within named *Richard Strongbill* the lessor of the plaintiff, his first-born and only son. And the said jurors do upon their said oath farther declare, that the said *Judith* afterwards, to wit, on the first day of *May*, in the year of our Lord one thousand six hundred and seventy-nine, died seised as aforesaid: after whose death the said *Henry* entered into the said tenements with the appurtenances, whereof, &c. and was seised thereof as the law requires: and afterwards, to wit, on the tenth day of *August* in the year of our Lord one thousand six hundred and eighty-one, he the said *Henry* being seised as aforesaid, by an indenture executed between the said *Henry Strongbill* of the one part, and sir *John Simpson* of the *Inner Temple London* Knight, of the other part, for and in consideration of five shillings of lawful money of *England* mentioned in the said indenture to have been paid by the

Henry had
issue the
plaintiff's
lessor.

Judith died
seised.

Henry enter-
ed, and bar-
gained and
sold.

the said *John Simpson* to the said *Henry Strongbill*, he the said *Henry Strongbill* demised, bargained, and sold to the said *John Simpson*, the tenements aforesaid, with the appurtenances, mentioned in the declaration aforesaid; to have and to hold to the said *John Simpson*, from the feast of St. John Baptist then last past, before the date of the said indenture, for the term of six months then next following: as by the said indenture, produced to the jury in evidence, doth more fully appear. By virtue whereof he the said *John Simpson* entered into the said tenements with the appurtenances, mentioned in the said declaration, and was thereof possessed for the term aforesaid; and being so possessed thereof, afterwards, to wit, on the eleventh day of the same month of *August*, in the year last above mentioned, by an indenture executed between the said *Henry Strongbill* of the one part, and the said *John Simpson* of the other part, bearing date the same day and year, in consideration of the sum of nine hundred pounds of lawful money of *England*, paid by the said *John Simpson* to the said *Henry Strongbill*, he the said *Henry Strongbill*, granted, bargained, sold, released, and confirmed to the said *John Simpson* and his heirs (he then being

And afterwards released to Simpson.

in actual possession thereof) the tenements
aforesaid with the appurtenances, mentioned
in the said declaration; to have and to
hold to the said *John Simpson*, his heirs and
assigns; to the sole use and behoof of the
said *John Simpson*, his heirs and assigns for
ever: and the said jurors do upon their said
oath farther declare, that in the said last
mentioned indenture it is thus contained in
the following clause, that is to say, [here was
inserted, at length, a covenant to suffer a
recovery, to the use of *Simpson*, his heirs
and assigns for ever; and then was stated as
before, *mutatis mutandis*, a recovery suffered
accordingly.] By virtue whereof he the said
John Simpson entred into the tenements afore-
said whereof the tenements aforesaid, men-
tioned in the said declaration, are parcel,
and was seised thereof, as the law requires;
and being so seised thereof, afterwards, to
wit, on the first day of *May*, in the year
of our Lord one thousand six hundred and
eighty-three, he died: after whose decease
the tenements aforesaid with the appurte-
nances, whereof, &c. descended to *Thomas
Simpson* only son and heir of the said *John
Simpson*; by virtue whereof he the said
Thomas Simpson the son entered into the
said tenements, with the appurtenances, and
was seised thereof, as the law requires;
and

Entry and
death of
Simpson.

Descent to
his son,

who entered,

and by indenture of bargain and sale granted to Henry Oxenden, &c.

and afterwards, to wit, on the sixteenth day of *November*, in the year of our Lord 1683, he the said *Thomas Simpson*, being seised as aforesaid, did by an indenture tripartite executed between the said *Henry Strongbill* and *Thomas Simpson* of the first part, *Henry Oxenden* esquire, by the name of, &c. of the second part; and *George Oxenden* of, &c. and *Richard Oxenden*, &c. of the third part; bearing date the same day and year, in consideration of the sum of five shillings of lawful money of *England*, mentioned in the said indenture to have been paid to the said *Henry Strongbill* and *Thomas Simpson*, they the said *Henry Strongbill* and *Thomas Simpson* bargained and sold to the said *George Oxenden* and *Richard Oxenden* the tenements aforesaid with the appurtenances, mentioned in the said declaration, (amongst other things;) to have and to hold to the said *George* and *Richard*, from the day next before the day of the date of the said indenture, for the term of one whole year next ensuing, with an intent that the said *George* and *Richard* should, by virtue of the said indenture, and by force of the statute for transferring uses into possession, be in actual possession of the premises aforesaid, whereof, &c. and be thereby enabled to accept a grant and release of the reversion and inheritance

inheritance therein, to the said George and Richard, and their heirs, to the uses, intents, and purposes, to be limited expressed and declared as by the said indenture, produced in evidence to the said jurors, it doth and may more fully appear. By virtue whereof the said George Oxenden and Richard Oxenden entered into the tenements aforesaid, mentioned in the said declaration, and were thereof possessed for the term aforesaid; and being so possessed thereof, afterwards, to wit, on the seventeenth day of November in the year last above mentioned, by an indenture tripartite, executed between them the said Henry Strongbill and Thomas Simpson of the first part, the said Henry Oxenden of the second part, and the said Richard Oxenden and George Oxenden of the third part, bearing date the same day and year, in consideration of the sum of 995 l. 5 s. of lawful money of England, paid by the said Henry Oxenden to the said Thomas Simpson, and of the sum of 844 l. 15 s. of like lawful money of England, paid by the said Henry Oxenden to the said Henry Strongbill, he the said Henry Strongbill sold, aliened, released, and confirmed to the said George Oxenden and Richard Oxenden, (amongst other things,) the said tenements with the appurtenances, mentioned in the

Q

declaration

Release
thereupon.

Entry of
George and
Richard Ox-
enden.

And a fine
levied to them
by Stronghill
and his wife.

declaration aforesaid, (then being in their actual possession); to have and to hold to the said *George Oxenden* and *Richard Oxenden*, their heirs and assigns for ever. And the said jurors do upon their said oath further declare, that this following clause is contained in the said indenture last mentioned. [Here was set forth a covenant for further assurance, *in hac verba*.] As by the said indenture, produced in evidence to the said jurors, it doth and may appear; by virtue whereof they the said *George* and *Richard Oxenden* entered into the said tenements, with the appurtenances, mentioned in the said declaration, whereof, &c. and were seised thereof as the law requires; and being so seised thereof, afterwards, that is to say, in *Michaelmas* term in the year last above mentioned, a fine was levied in the court of our late sovereign lord king *Charles* the second, before *Thomas Jones*, *Hugh Wyndham*, *Job Charlton*, and *Creswell Levinz*, his said late majesty's justices of the court of *Common Pleas*, between the said *Henry Oxenden* plaintiff, and the said *Henry Stronghill* and the said *Frances* his wife, deforciant, of the tenements aforesaid with the appurtenances, mentioned in the said declaration, by the name of, &c. By which said fine they the said

said *Henry Strongbill* and *Frances* acknowledged the tenements aforesaid with the appurtenances, whereof, &c. (amongst other things,) to be the right of *Henry Oxenden*, as those which he the said *Henry Oxenden* had by the gift of the said *Henry Strongbill* and *Frances*, and those they remised and quit-claimed from them the said *Henry Strongbill* and *Frances* and their heirs, to the said *Henry Oxenden* and his heirs for ever; and further, they the said *Henry Strongbill* and *Frances* granted, for themselves and the heirs of the said *Henry Strongbill*, that they would warrant to the said *Henry Oxenden* and his heirs the tenements aforesaid, with the appurtenances, whereof, &c. against the said *Henry Strongbill* and *Frances*, and the heirs of the said *Henry Strongbill*, for ever. And the said jurors do upon their said oath further declare, that the said fine, levied as aforesaid, was levied to the use of the said *George Oxenden* and *Richard Oxenden*, their heirs and assigns; whereby the said *George Oxenden* and *Richard Oxenden* were seised of the tenements aforesaid, with the appurtenances, whereof the tenements, mentioned in the said declaration, are parcel, as the law requires; and afterwards, to wit, in the year of our Lord 1695, the said *Henry Strongbill* died,

Q 2

and

Henry Stronghill
died.

Richard, his
eldest son,
being then
under age.

George and
Richard Ox-
enden leased
to John Jor-
dan and
others at
will,

Who entered.

And the
plaintiff's
lessor entered
upon them,

and left issue of his body *Richard Strongbill* the lessor of the plaintiff, his first begotten son and heir, (the said *Richard* then being within the age of twenty-one years); and the said *Richard Oxenden* and *Georga Oxenden* being so seised thereof, they the said *George* and *Richard* afterwards, to wit, on the first day of *April*, in the ninth year of the reign of his present majesty demised the tenements aforesaid, with the appurtenances, whereof the tenements mentioned in the said declaration are parcel, to the said *John Jordan*, *John Mittel*, and *Thomas Hammond*; to have and to hold to the said *John Jordan*, *John Mittel*, and *Thomas Hammond* from the feast of the annunciation of the blessed virgin *Mary* then last past, for one whole year, and so from year to year, as long as both parties should please: by virtue of which lease they the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, entered into the said demised premises, with the appurtenances, and were possessed thereof: and being so possessed thereof, he the said *Richard Strongbill*, lessor of the said *James York*, afterwards, to wit, on the seventh day of *October*, in the ninth year of the reign of his present majesty, entered into the said tenements, with the appurtenances, whereof the said tenements, mentioned in the

the

the said declaration, are parcel, and from thence drove out and removed the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, and was seised thereof as the law requires; and being so seised thereof, he the said *Richard Strongbill* on the seventh day of *October* in the ninth year of the reign of his present majesty, demised to the said *James York* the tenements aforesaid, with the appurtenances, to hold to the said *James York* and his assigns, from the 29th day of *September* then last past, to the full end and term of five years from thence next ensuing and fully to be compleat and ended; by virtue of which said demise, he the said *James York* entered into the said tenements, with the appurtenances, and was thereof possessed, until the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, afterwards, to wit, on the said seventh day of *October* in the ninth year aforesaid, mentioned in the declaration aforesaid, entered into the tenements aforesaid with the appurtenances, which the said *Richard Strongbill* had demised to the said *James* in the manner aforesaid, for the said term, which is yet unexpired, in and upon the possession of the said *James*, and ejected drove out and removed him the said *James* from his farm aforesaid, for the term aforesaid; and him

And ejected them, and became seized, and demised to the plaintiff,

Who entered upon the defendants.

Q3. the

But whether
the defend-
ants are guil-
ty, the jury
leave to
the judges,
and if they
determine
that they are
guilty, then
the jury find
them so.

the said *James*, so ejected driven out and removed, hath withheld and still doth withhold from his said possession thereof, as the said *James* doth within thereof complain against him; but whether upon the whole matter aforesaid, found by the said jurors in the manner aforesaid, it shall appear to his majesty's justices of this court, that they the said *John Jordan John Mittel* and *Thomas Hammond* are guilty of the trespass and ejectment within written, in the tenements aforesaid with the appurtenances mentioned in the said declaration, the said jurors are altogether ignorant; and therefore pray the advice of this court; and if upon the whole matter aforesaid, found by the said jurors in the manner aforesaid, it shall appear to his said majesty's justices of this court, that they the said *John Jordan John Mittel* and *Thomas Hammond* are in construction of law guilty of the trespass and ejectment aforesaid, in the said tenements, with the appurtenances, within mentioned in the said declaration, then the said jurors declare, upon their said oath, that they the said *John Jordan John Mittel* and *Thomas Hammond* are guilty thereof, in such manner and form as the said *James York* doth within thereof complain against them; and they assess the damages of the said *James* on that occasion, besides his expences and costs laid

laid out by him about his suit in this cause, to twelve pence, and for his expences and costs to twenty shillings; but if upon the whole matter aforesaid, found by the said jurors in the manner aforesaid, it shall appear to his said majesty's justices of this court, that they the said *John Jordan John Mittel* and *Thomas Hammond* are, in construction of law, not guilty of the trespass and ejectment aforesaid, in the tenements aforesaid, with the appurtenances, abovementioned in the said declaration, then the said jurors declare upon their said oath, that they the said *John Jordan John Mittel* and *Thomas Hammond* are not guilty thereof, in such manner and form as the said *John Jordan John Mittel* and *Thomas Hammond* have within alledged in their plea: and because the said justices of this court are not yet advised what judgment to give of and concerning the premisses, a day therefore is given to the said parties, before sir *George Treby* knight and his brethren, his said majesty's justices of his said court of *Common Pleas*, in fifteen days from *Easter* day, to hear their judgment thereupon, the proceedings to be in the same state as they now are. At which day as well the said *James* as the said *John Jordan John Mittel* and *Thomas Hammond* came hither by their

If not, then
they find them
not guilty.

Continu-
ances.

attornies aforesaid; and because the said justices of this court are willing further to advise themselves of and concerning the premises, before they give judgment thereupon, a day is here given to the said parties till the morrow of the *Holy Trinity*, to hear their judgment thereupon, for that the said justices are not yet determined, &c.

§ 2. *Humfry v. Batburst.*

1 Lut. 741.

Not guilty.

Award of the
Venire.

Award of
Nisi prius.

AND the said *Edward*, by *Edmund Hodsell* his attorney, comes and defends the force and injury, when, &c. and pleads, that he is in no wise guilty of the trespass and ejectment aforesaid, as the said *John* above complains against him; and thereof he puts himself upon the country, and the said *John* does likewise the same: therefore the sheriff is commanded that he cause to come hither, on the octave of the purification of the blessed virgin *Mary*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. At which day the jury between the said parties, in the said action, were respited here until this day, namely in fifteen days from the feast of *Easter* then next following, unless his present majesty's justices assigned to hold the assizes in the county aforesaid,

by virtue of the statute, &c. should come before, on *Tuesday* the eighteenth day of *March* next ensuing, at *Rochester* in the county aforesaid. And now here at this day the said *John* came by his said attorney, and the said justices of assizes before whom, &c. returned hither their record in these words: Afterwards, at the day and place within contained, as well the within named *John Humfry*, as the within written *Edward Bathurst*, by their attornies within mentioned, came before sir *Thomas Jones* knight, his majesty's chief justice of the court of *Common Pleas*, and sir *Job Charlton* knight, one of his said majesty's justices of the *Common Pleas*, assigned by virtue of the statute, &c. to hold the assizes in the county of *Kent*, and the jurors of the jury whereof mention is within made, being summoned, some of them, namely, *E. S. &c.* appear, and are sworn upon the jury: and because the rest of the jurors of the jury have not appeared, therefore others of the by-standers, chosen by the sheriff of the county aforesaid for this purpose, are, at the request of the said *John Humfry*, and by the command of the said justices, put on anew, whose names are affixed in the within written pannel, according to the direction of the statute in such case made and provided; and the jurors so put

Postea.

Tales de circumstantibus.

As to two parts of the manor, and as to two third parts of the premises, not guilty.

As to the other third part, a special verdict.

put on anew, namely *J. B. &c.* being called, likewise appear, who being chosen tried and sworn, together with the jurors before impanelled and sworn, to declare the truth of the within contents, as to the within written trespass and ejectment in two parts of the manor of *Pullens*, with the appurtenances within mentioned (the whole in three parts to be divided) and also in two parts of all and singular the tenements within written, with the appurtenances, (the whole in three parts likewise to be divided), declare upon their oath, that the said *E. B.* is in no wise guilty thereof, as the said *E. B.* hath within alledged in his plea: and as to the within written trespass and ejectment, in the third part of the manor aforesaid, with the appurtenances, residue of the said manor, and also in the third part of all and singular the tenements aforesaid, with the appurtenances, residue of the said tenements, with the appurtenances, (the whole in three parts to be divided), as aforesaid, the said jurors do farther declare, upon their said oath, that long before the within written time when the trespass and ejectment within mentioned are within supposed to have been committed, namely, on the first day of *December* in the thirty-eighth year of the reign of our late sovereign lady *Elizabeth*,
late

late queen of *England*, one *Paul Bathurst* was seised in fee of and in the manor aforesaid, with the appurtenances, and also of and in all and singular the tenements aforesaid, with the appurtenances, specified in the within written declaration, in his demesne as of a fee: and the said jurors further declare, upon their said oath, that the said *Paul Bathurst* had issue of his body, lawfully begotten, *Edward Bathurst* his son and heir apparent; and that the said *Paul Bathurst* afterwards and before the said time when, &c. namely, on the seventh day of *December*, in the fortieth year of the reign of our said late sovereign lady *Elizabeth*, late queen of *England*, &c. made and as his deed delivered a certain indenture, sealed with his seal, executed between the said *Paul Bathurst* by the name of, &c. of the one part, and the said *Edmund Bathurst* his son, one *John Horsmonden*, *George Day*, and *Robert Austen*, by the names of &c. of the other part, bearing date on the said seventh day of *December*, in the said fortieth year of the reign of our said late sovereign lady *Elizabeth*, late queen of *England*, &c. the tenor of which indenture followeth in these words; [set forth the indenture *in hac verba*.] As it doth and may by the indenture aforesaid,

P. Bathurst
seised in fee,

had issue Edward, his son and heir apparent.

Indenture between P. B. of the one part, and the said Edward and others of the other part.

now

Death of Paul
Bathurst,

Entry of Ed-
ward his son,

Who had is-
sue Thomas
his eldest son,
and Edward
William, and
Robert.

That Edward
the Father
died seised,

now shewn to the said justices, and proved read and given in evidence to the said jury, (among other things) more fully appear. And the said jurors further declare upon their oath, that the said *Paul Bathurst* afterwards and before the said time when, *&c.* namely, on the eighth day of *December*, in the forty-second year of the reign of the said late sovereign lady queen *Elizabeth*, died at *Gowdburst* aforesaid, in the said county of *Kent*; and that the said *Edward Bathurst*, son and heir of the said *Paul Bathurst*, afterwards and before the said time when, *&c.* namely, on the tenth day of the aforesaid month of *December*, in the forty-second year aforesaid, entered into the manor and tenements aforesaid, with the appurtenances, and was seised thereof, as the law requires; and that the said *Edward Bathurst*, son and heir of the said *Paul Bathurst*, had issue, of his body lawfully begotten, four sons, *viz.* *Thomas* his eldest son, *Edward* his second son, father to the said *Edward*, *William* his third son, and *Richard* his fourth son; and that the said *Edward* the father, being so seised, afterwards and before the said time when, *&c.* namely, on the first day of *May*, in the year of our Lord 1630, died at *Gowdburst* aforesaid, in the said county of *Kent*; and that

that *Thomas Bathurst*, the eldest son of the said *Edward* survived him; and that he afterwards, and before the said time when, &c. namely, on the second day of *May*, in the year of our Lord 1663. entered into the said manor and tenements, with the appurtenances, and was seised thereof as the law requires: and the said jurors do further declare, upon their said oath, that afterwards, and before the said time when, &c. to wit, in *Michaelmas* term, in the seventh year of the reign of his late majesty king *Charles* the first, before sir *Robert Heath* knight and his brethren, then justices of the court of *Common Pleas* of his said late majesty king *Charles* the first, at *Westminster*, one *George Maplesden* gentleman, and *James Sarys* gentleman personally demanded against the said *Thomas Bathurst*, by the name of *Thomas Bathurst* gentleman, the manor of *Pullens*, with the appurtenances, and one messuage, &c. as his right and inheritance, and into which the said *Thomas* had not any entry but after a disseisin, which *Hugh Hunt* unjustly and without judgment made thereon, to the said *George* and *James*, within thirty years, &c. And whereupon they declared that they were seised of the manor, tenements, and rents aforesaid, with the appurtenances in their demesne of a fee and right,

Entry of
Thomas his
eldest son,

Who suffered
a recovery.

Wherein Edward Howse was vouched.

Plea of the vouchee.

right, in time of peace, in the time of our late sovereign lord the king that then was, by taking the profits thereof, &c. and in which, &c. and thereof they brought their suit, &c. And the said *Thomas* personally came and defended his right when, &c. And thereupon vouched to warranty *Edward Howse*, who being then personally present in court, *gratis* warranted to him the manor tenements and rents aforesaid, with the appurtenances; and thereupon the said *George* and *James* demanded against the said *Edward*, tenant by his warranty, the manor tenements and rents aforesaid, with the appurtenances: and whereupon they declared that they were seised of the manor tenements and rents aforesaid, with the appurtenances, in their demesne as of fee and right, in time of peace, in the time of our said late sovereign lord the king, that then was, by taking the profits thereof, &c. And in which, &c. And thereupon they brought their suit, &c. And the said *Edward*, tenant by his warranty, defended his right, when, &c. and pleaded that the said *Hugh* had not disseised the said *George* and *James* of the manor tenements and rents aforesaid, with the appurtenances, as they the said *George* and *James* had by their said writ and declaration supposed; and thereof

thereof they put themselves on the country, and the said *George* and *James* did likewise the same; and the said *George* and *James* prayed leave thereto to imparl, and it was granted to them, &c. and afterwards, in that same term, they the said *George* and *James* personally came again there into court at *Westminster*, and the said *Edward*, although solemnly called, came not again, but departed in contempt of the court, and made default; therefore it was adjudged that the said *George* and *James* should recover their seisin, against the said *Thomas*, of the manor tenements and rents aforesaid, with the appurtenances, and that the said *Thomas* should have of the lands of the said *Edward* to the value, &c.; and that the said *Edward* should be amerced. And thereupon the said *George* and *James* prayed his majesty's writ, to be directed to the sheriff of the county aforesaid, to cause them to have full seisin, of the manor tenements and rents aforesaid, with the appurtenances, and it was granted to them, returnable forthwith into the court aforesaid; and that afterwards, namely, on the fifteenth day of *November*, in that same term, the said *George* and *James* personally came there into the said court at *Westminster*, and the sheriff, namely, *sir Robert Lewkener* knight, then made

Imparlance.

Judgment.

Writ of seisin.

Return.

Indenture between T. B. of the one part, and Walter Roberts and Henry Crispe of the other part.

That the said T. B. married.

made a return, that he by virtue of the writ aforesaid to him directed, on the tenth day of *November* then last past, caused the said *George* and *James* to have full seisin of the manor tenements and rents aforesaid with the appurtenances, as he had been directed by the writ aforesaid. And the said jurors do further declare, upon their said oath, that the said *Thomas Bathurst* afterwards, and before the said time when, &c. namely, on the twenty-fifth day of *February*, in the eighth year of the reign of his said late majesty king *Charles* the 1st, made and as his deed delivered an indenture sealed with his seal, executed between the said *Thomas Bathurst* (by the name of *Thomas Bathurst*) of the one part, and sir *Walter Roberts* knight and *Henry Crisp* esquire, (by the names of, &c.) of the other part, bearing date on the twenty-fifth day of *February*, in the eighth year of the reign of his said late majesty king *Charles* the first; the tenor of which said indenture follows in these words: [here set out the indenture]. As by the said last mentioned indenture, now shewn here to the said justices, and proved read and given in evidence to the said jury, (amongst other things,) it doth and may more fully appear. And the said jurors do further declare, upon their said oath, that the said *Thomas Bathurst*, afterwards and before

A P P E N D I X.

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before the said time when, &c. namely, on the twenty-sixth day of the said month of *February*, in the eighth year of the reign of his said late majesty king *Charles* the first, took to wife, and was lawfully married to, the above named *Elizabeth Hooper*; and that the said *Thomas Barburst*, afterwards and before the said time when, &c. namely, on the twenty-seventh day of *February*, in the ninth year of the reign of his said late majesty king *Charles* the first, died at *Gowdbursh* aforesaid, in the said county of *Kent*, without any issue of his body lawfully begotten; and that the said *Elizabeth* his wife survived him, and afterwards and before the said time when, &c. namely, on the twenty-eighth day of *February*, in the ninth year of the reign of his said late majesty king *Charles* the first, she the said *Elizabeth* entered into the manor and tenements aforesaid, with the appurtenances, and was thereof seised, for and during the term of the life of the said *Elizabeth*, the reversion belonging to the right heirs of the said *Thomas Barburst*. And the said jurors do further declare, upon their said oath, that afterwards and before the said time, when, &c. to wit, on the first day of *October*, in the year of our Lord 1658, the said *William Barburst*,
R brother

And died without issue.

That *Elizabeth* survived, and was seised for her life.

The reversion expectant to the right heirs of *T. B.*

That *W. B.* brother made his will.

brother to the said *Thomas*, made his last will and testament in writing, (amongst other things) in these *English* words following. [Set forth the will in *hæc verba*.] As by the said last will and testament of the said *William Bathurst*, now shewn here to the said justices, and read and given in evidence to the said jury, it doth and may (amongst other things) more fully and at large appear. And the said jurors do further declare, upon their said oath, that the said *William Bathurst* afterwards and before the said time when, &c. namely, on the eighth day of *July*, in the year of our Lord 1650, died at *Eltham* in the said county, and that afterwards and before the said time when, &c. namely, on the first day of *December*, in the thirty-second year of the reign of his present majesty king *Charles* the second, the said *Elizabeth Bathurst*, widow and relict of the above named *Thomas Bathurst*, died at *Gowdburst* aforesaid, in the said county of *Kent*; and that after the decease of the said *Elizabeth Bathurst*, widow and relict of the said *Thomas Bathurst*, and before the said time when, &c. namely, on the tenth day of *December*, in the thirty-second year of the reign of his said present majesty, the said *Edward Bathurst* the now defendant, son and heir of the said *Thomas Bathurst*

That the said
W. B. died.

And also the
said *Eliz.*

Entry of the
defendant
E. B. as heir
to T. B.

Batburst, entered into the said manor and tenements with the appurtenances, and was seised thereof, as the law requires. And the said jurors do further declare, upon their said oath, that the said manor and tenements with the appurtenances, now are, and for so long a time as there is no remembrance of any man to the contrary, have been, of the tenure of antient demesne of the crown of the kingdom of *England* in fee, and during all that time have been and now are held of the manor of *Aylesford* in the said county of *Kent*, and that the said manor of *Aylesford*, with the appurtenances, now is, and for so long a time as there is no remembrance of any man to the contrary hath been, antient demesne of the crown of the kingdom of *England*. And the said jurors do further declare, upon their said oath, that the said *Edward Batburst* the son, the now defendant, being seised as aforesaid of and in the said manor and tenements, with the appurtenances, (amongst other things) it is enrolled among the pleas at *Westminster*, before sir *Francis North* knight and his brethren, the justices of the court of *Common Pleas* of our sovereign lord the king, of *Trinity* term in the thirty-third year of the reign of his present majesty, that the said *Edward Batburst* the

R 2

son,

That the said manor and tenements are antient demesne held of the manor of *Aylesford*,

A record of a writ of disceit to reverse a recovery of lands in antient demesne.

son, by the name of *Edward Batburs* esquire, son and heir of *Edward Batburs* his father, and heir to *Thomas Batburs* esquire, was attached to answer to sir *Thomas Colepeppere* baronet, son and heir of *Richard Colepeppere* baronet, and heir to sir *William Colepeppere* baronet, of a plea that whereas the said *Thomas Colepeppere* for ten years then last past had been, and then was, seised of the manor of *Aylesford*, with the appurtenances, in the said county, in his demesne as of fee, which said manor, with the appurtenances, then was, and for so long a time as there was no remembrance of any man to the contrary had been, ancient demesne of the crown of *England*, and all the lands and tenements which were held of that manor had time out of mind been pleadable and impleaded in the court of the said manor, before the steward thereof for the time being, by his majesty's writ of right close, and not elsewhere, according to the custom of the said manor, time out of mind therein used and approved of. And that the said *Thomas Batburs* in his life-time, and *George Maplesden* gentleman, and *James Sarys* gentleman, being now likewise dead, well knowing the premises, but contriving craftily to deceive and defraud the said *William* and his successors,

cessors, lords of the said manor, of the profit of that manor; they the said *George Maplesden* and *James Sarys*, on the seventeenth day of *October* in the seventh year of the reign of his late majesty king *Charles* the first, he the said *William* being seised of the said manor, with the appurtenances in his demesne as of fee, prosecuted out of the high court of *Chancery* of his said late majesty, (that court then being held at *Westminster* in the county of *Middlesex*,) his said late majesty's writ of entry *sur disseisin en le post*, against the said *Thomas Batburst*, of the manor of *Pullens* with the appurtenances, and of one messuage, &c. directed to the sheriff of the same county, and returnable before his said late majesty's justices at *Westminster* aforesaid, on the morrow of *All Souls* then next ensuing; by virtue of which said writ and the return thereof, such proceedings in law were made and had thereupon on the said morrow of *All Souls*, and other concurring circumstances requisite in such cases, that they the said *George* and *James* in *Michaelmas* term, in the said seventh year, recovered against the said *Thomas Batburst* the said manor of *Pullens*, and the said tenements and rents, with the appurtenances; as by the record and proceedings thereof, now remaining

in his said majesty's court, before his justices, to wit, at *Westminster* aforesaid, it doth and may more fully and at large appear; which said recovery was suffered to the use of the said *Thomas Batburst* and his heirs for ever; and by means of the said recovery, and by force of an act made in the parliament of our late sovereign *Henry VIII.* late king of *England*, on the fourth day of *February*, in the twenty-seventh year of his reign, at *Westminster*, in the county of *Middlesex*, for transferring uses into possession, he the said *Thomas Batburst* became seised of and in the said manor of *Pullens*, and of the tenements and rents aforesaid, with the appurtenances, in his demesne as of fee. And he the said *Thomas Colepeppye* farther declared, that the manor tenements and rents, with the appurtenances, specified in the said writ of entry, at the time of suing out of the said writ, and also at the time of the said recovery thereupon had, were held of the said *W. C.* as of his manor of *Aylesford* aforesaid, and during all the time aforesaid, until the day of suing out the said writ, according to the custom of the said manor of *Aylesford*, were pleadable and impleaded in the court of the said manor, and not elsewhere; by which recovery suffered in the manner

manner aforesaid, the said manor of *Pullens*, and the tenements aforesaid, with the appurtenances, became a frank fee, and pleadable and impleaded at common law, to the deceit of the court of the said *William*, lord of the manor of *Aylesford* aforesaid, and to the manifest danger of the disinherison of the said *T. C.* to the damage of the said *T. C.* forty pounds; and whereupon the said *T. C.* by *Hope Gyfford* his attorney complained, that whereas the said *T. C.* for ten years then last past had been, and then was, seized of the manor of *Aylesford*, with the appurtenances, (and so reciting the count in the action of deceit in the same manner with the writ above mentioned, until you come to the words) to the damage of the said *T. C.* forty pounds, and thereof he brought his suit, &c. And the said *E. B.* the now defendant, by *Edmund Hadsell* his attorney, came and defended the force and injury, when, &c. and pleaded that he could not deny the action of the said *T. C.* nor but that the said *Thomas* was, and for ten years last past had been, seized of the said manor of *Aylesford* with the appurtenances, in his demesne as of fee; nor but that the said manor with the appurtenances, then was, and for so long a time as there had been no remembrance

of any man to the contrary had been, antient demefne of the crown of *England*; nor but that all the lands and tenements, which were held of the faid manor, were time out of mind pleadable and impleaded in the court of the manor aforefaid, before the fteward thereof for the time being, by his majefty's writ of right clofe, and not elfewhere, according to the custom of the faid manor, time out of mind ufed and approved of; and that the manor, with the tenements and rents aforefaid, fpecified in the faid writ of entry, at the time of fuing out the fame, and at the time of the faid recovery thereupon had and fuffered, were held of the faid *W. C.* as of his manor of *Aylesford* aforefaid; and during the time aforefaid, till the day of fuing out the faid writ, had been pleadable and impleaded in the court of the faid manor, according to the custom of the fame manor of *Aylesford*; as the faid *T. C.* had above alledged, in his writ and declaration aforefaid; therefore it was adjudged, that the faid *T.* have again his faid court, that is, that the manor rents and tenements aforefaid with the appurtenances, fpecified in the faid writ of entry, be pleaded removed and brought back again into the faid court, within the jurisdiction thereof, notwithstanding the faid judg-

Judgment for
the plaintiff,
in the writ of
difceit.

judgment given upon the said writ of entry, in his said late majesty's court at *Westminster* aforesaid; and that the said recovery be annulled, and made entirely of no effect: and that the said *T.* be restored to all things which he lost by reason of the said judgment, given upon the said writ of entry; and that the said *Edward Bathurst* the defendant be amerced: As by the record thereof, now remaining at *Westminster*, in the county of *Middlesex*, recorded, it doth and may more fully appear. And the said jurors do further declare, upon their said oath, that afterwards, and before the said time when, &c. namely, on the first day of *April*, in the thirty-fourth year of the reign of his present majesty, *Charles* the second, now king of *England*, &c. she the said *Elizabeth Bathurst* widow, late wife of the said *William Bathurst* deceased, entered into the manor and tenements, with the appurtenances aforesaid, and was thereof possessed; and that the said *Elizabeth Bathurst* widow, relict of the said *William Bathurst*, afterwards, and before the said time when, &c. namely, on the said seventh day of the said month of *April*, in the thirty-fourth year aforesaid, made and as her deed delivered an indenture, sealed with her seal, executed between the said *Elizabeth*

Entry of Elizabeth, relict of William Bathurst,

who leased to the lessor of the plaintiff for five years,

beth

And that
Elizabeth is
now alive.

heth Bathurst last above named, by the name of, &c. of the one part, and *Thomas Crampe*, by the name of, &c. of the other part, bearing date on the said seventh day of *April*, in the said thirty-fourth year; the tenor of which said indenture followeth in these words; [this was a common lease for five years, made by *Elizabeth Bathurst* to *Crampe*.] And the said jurors do further declare upon their said oath, that the said *Elizabeth Bathurst* widow, relict of the said *William Bathurst*, is now alive, and in good health; [and then the jury found the lease entry and ouster in the declaration, and made the proper general conclusion,] but whether, &c.

§ 3. *Norton v. Ladd.*

Lut. 756.
Verdict, as
to part for
the plaintiff,

AS to nine acres three roods and an half of land, with the appurtenances, part of the tenements specified in the within declaration, the said jurors declare, upon their oath, that the said *John Ladd* is guilty of the trespass and ejectment within written, in the nine acres three roods and an half of land aforesaid, with the appurtenances, as the said *John Norton* doth within complain against him; and they assess the damages of the said *John Norton*, by reason of

of the said trespass and ejectment, besides his expences and costs laid out by him about his suit in that particular, to sixpence, and for his expences and costs to forty shillings: and as to one garden, &c. with the appurtenances, other part of the tenements specified in the within declaration, with the appurtenances, they declare, upon their said oath, that the said *John Ladd*, is not guilty of the within written trespass and ejectment, in the said one garden, &c. with the appurtenances, in such manner and form as the said *John Ladd* hath within alledged in his plea: and as to one messuage, &c. residue of the tenements with the appurtenances, within mentioned in the said declaration, the said jurors do further declare, upon their said oath, that long before the said within written time, when the within specified lease was made, one *Edmund Cook* senior was seised in his demesne as of fee, at the will of the lord of the manor of *Thorne cum membris*, in the county of *Norfolk*, according to the custom of the manor aforesaid, of and in the said one messuage, &c. with the appurtenances aforesaid, in *Brinton Briningham*, and *Stodley*, being customary tenements, held of the lord of the manor aforesaid, and parcel of the manor of *Thorne cum membris*,

as to other part not guilty.

And as to the residue, a special verdict; that *Edmund Cook* the elder being seised in fee of copyhold lands.

and having
three sons,
and three
daughters,

surrendered
to the use of
his will,

membris, in the said county of *Norfolk*, and demised and demisable by the lord of the said manor, or his steward thereof, for the time being, by copy of the court rolls of the said manor, to any person or persons whatsoever, willing to take the same in fee-simple, or otherwise, at the will of the lord, according to the custom of the manor aforesaid. And the said *Edmund Cook* senior being so seized thereof, and having issue three sons, of his body lawfully begotten, *Robert Cook*, *Edmund Cook* and *John Cooke*, and three daughters, *Cicely*, *Ellen*, and *Alice*, he the said *Edmund Cook*, afterwards and before the within written time when the within mentioned lease was made, at the court of the manor of *Thorneg cum membris* aforesaid, held there on the fifth day of *October*, in the year of our Lord 1659, personally and in open court, before the whole homage, surrendered into the hands of the lord of the manor aforesaid, by the hands of the steward of the court, all his customary messuages lands and tenements whatsoever, as well in possession as in reversion, within that manor, by copy of the court rolls, according to the custom of the manor aforesaid, to such use or uses as he should, by his last will and testament in writing, limit or appoint, and that the said *Edmund Cook* senior

senior had then *Anne* his wife, and afterwards, namely, on the ninth day of *June*, in the year of our Lord 1668 made and ordained his last will and testament in writing, and thereby gave and devised in these following *English* words, to wit, [here was set out the will of *Edmund Cook* the elder, *in hæc verba*, by which he devised the premises to his wife for life; remainder to his son *Edmund* in fee.] As by the said last will and testament of the said *Edmund Cook* the father, now shewn here in court and given in evidence, it doth more fully appear. And the said jurors do further and died. declare upon their said oath, that after the said first day of *August*, in the said year of our Lord 1668 the said *Edmund Cook* the testator died at *Brinton* aforesaid: after whose death, namely, at a court specially held for the said manor of *Thorneg cum membris*, on the eighth day of *May* in the twenty-fourth year of the reign of his present majesty, the said *Edmund Cook*, the son of the said *Edmund Cook* deceased, came and brought into the same court the said last will and testament of the said *Edmund Cook* deceased, and craved of the lord of the said manor, to admit him tenant to the remainder of the said one messuage, &c. with the appurtenances; whereupon the said

Admission
of *Edmund*
Cook, the
son.

Edmund

Edmund Cook the son, at the same court of the manor aforesaid, held at the said manor, on the day and year last above mentioned, was admitted tenant to the said remainder of the said tenements, with the appurtenances, to hold to him and his heirs, after the decease of the said *Anne*, according to the custom of the manor aforesaid, and the said remainder was then and there granted to the said *Edmund* the son, by the lord of the said manor, according to the custom of the manor aforesaid, to hold the said tenements, with the appurtenances, to the said *Edmund* the son and his heirs, after the decease of the said *Anne*, according to the intent and purpose of the will aforesaid, at the will of the lord according to the custom of the said manor; as by the court rolls of the said court made thereof, here brought and shewn to this court, and read and given in evidence to the said jurors, doth more fully appear: whereby the said *Edmund* the son was seised of the said remainder, as the law requires; and being so seised thereof, afterwards, to wit, on the day and year last above mentioned, he the said *Edmund Cook* the son came into the said court of the manor aforesaid, in his own person, and in open court surrendered into the hands

Surrender to
the use of his
will.

hands of the lord of the manor aforesaid, by the hands of the steward of that manor, the said one messuage, &c. with the appurtenances, to such use or uses as he should, by his last will and testament in writing, limit and appoint, according to the custom of the manor aforesaid. And the said jurors do further declare, upon their said oath, that the said *Edmund Cook* the son afterwards, namely, on the nineteenth day of *May* in the year of our Lord 1674, made his last will and testament in writing, and thereby gave and devised in these *English* words following, viz. [here was set out the will of *Edmund Cook* the son, *in hæc verba*, containing a devise of the premises to his sister *Alice* for life; remainder to his brother *John Cook*.] As by the said last will and testament of the said *Edmund* the son, now brought here and shewn to this court, and read and given in evidence to the said jury, it doth more fully appear: and the said *Edmund* the son afterwards, namely, on the first day of *June* in the said year of our Lord 1674, died at *Brinton* aforesaid, without issue of his body lawfully begotten. And the said jurors, upon their said oath, do further declare, that the said *Cicely Ellen* and *Alice*, sisters to the said *Edmund* the son, after-

Death of Edmund the son and his sisters without issue.

Death of the
mother.

Admission of
John Cook,
the brother
of Edmund.

afterwards, namely, on the first day of *August* in the year of our Lord 1675. died at *Brinton* aforesaid, without any issue of their or either of their bodies lawfully begotten; and the said *Anne Cook* widow, the mother, survived the said *Cicely*, *Ellen* and *Alice*; and afterwards, namely, on the first day of *September*, in the year of our Lord 1675, the said *Anne Cook* died at *Brinton* aforesaid, and that afterwards, namely, on the nineteenth day of *January* in the year of our Lord 1680. the said *John Cook*, brother to the said *Edmund Cook* the son deceased, came into the court of the said manor of *Thorneg cum membris* aforesaid, held on the same day and year last mentioned, and brought into that court the last will and testament of the said *Edmund* the son, his brother, made in writing, bearing date on the nineteenth day of *May* in the year of our Lord 1674 aforesaid, and the said *John Cook* craved of the lord of the said manor, to admit him tenant of the premises, according to the intent and purport of the said surrender and last will of the said *Edmund Cook* the son; whereupon the said *John Cook* was, at the said court of the same manor, there held on the day and year last above mentioned, admitted a tenant to the said one

one messuage, &c. with the appurtenances, according to the custom of the manor aforesaid; and the said tenements with the appurtenances, were then and there granted, in the same court, to the said *John Cook*, by the lord of the said manor, according to the custom thereof; to hold to the said *John*, according to the intent and purport of the said surrender and last will of the said *Edmund Cook* the son, at the will of the lord, according to the custom of the manor aforesaid; as by the copy of the court rolls last above mentioned made thereupon, now brought here into court, and given in evidence to the said jurors, more fully may appear; whereby the said *John Cook* entered into the said tenements with the appurtenances, last above mentioned, and was seised thereof, as the law requires. And being so thereof seised, he the said *John Cook* afterwards, namely, on the twenty-sixth day of *February*, in the year of our Lord 1682, by his writing, purporting to be a letter of attorney, under the hand and seal of the said *John Cook*, bearing date the day and year last above mentioned, and attested by *J. C. senior* and *F. W. junior*, sufficiently authorised one *J. C. junior* gentleman, a customary tenant of the manor aforesaid, to surrender into

Letter of attorney, to surrender to the use of *John Ladd*, and his heirs; upon condition to be void, on payment of 106*l.*

Surrender
accordingly:

the hands of the lord of the said manor, according to the custom of that manor, the said one messuage, &c. to the use and behoof of one *John Ladd* his heirs and assigns for ever; upon this condition, that if the said *John Cook*, his heirs executors and assigns or any of them, should pay, or cause to be paid, to the said *John Ladd*, his executors administrators or assigns, the sum of 106 l. upon the twenty-seventh day of *February*, which should be in the year of our Lord 1683, at or in the dwelling house of the said *John Ladd*, situate in *Norwich* aforesaid, that then the said last mentioned surrender should be void, or otherwise should remain in its full force; and afterwards, to wit, on the fourth day of *March*, in the year of our Lord 1682, the said *J. C.* junior came there into the court of the manor of *Thorneg cum membris* aforesaid, held at that manor, on the sixth day of *March*, in the year of our Lord 1682; before *William Burleigh* esquire, steward, and by virtue of the said writing or letter of attorney, according to the custom of the manor aforesaid, in the name of the said *John Cook*, surrendered into the hands of the lord of the said manor, by the hands of the said steward, the lands and tenements last above mentioned; to the use and behoof of the said *John Ladd*,
his

his heirs and assigns for ever; upon this condition, &c. [*prout*]. And the jurors further declare, upon their said oath, that the said *John Cook*, afterwards and before the within written time when the within specified lease was made, namely, on the twentieth day of *February*, in the first year of the reign of his present majesty, died at *Brinton* aforesaid, without issue of his body lawfully begotten; and that the said *Robert Cook* then and there likewise died, and that afterwards, to wit, on the twelfth day of *May*, in the first year of the reign of his said present majesty, the said *John Ladd* came into the court of the said manor, held at the said manor on the day and year last above mentioned, and shewed, that neither the said sum of 106*l.* or any part thereof, was paid, at the day and year above mentioned for the payment thereof, according to the intent and purport of the last mentioned surrender, and prayed, of the lord of the said manor, to admit him tenant to the premises aforesaid; and thereupon the said *John Ladd* was, at the same court of the manor aforesaid, admitted tenant to the said one messuage, &c. with the appurtenances, according to the custom of the manor aforesaid, and those tenements were then and there granted to the said *John Ladd*,

Death of
John Cook
and his brother Robert.

Admission of
John Ladd.

Title of the
lessor.

in the same court, by the lord of the said manor, according to the custom of that manor; to hold to the said *John Ladd* his heirs and assigns, according to the intent and purport of the last mentioned surrender, at the will of the lord, according to the custom of the manor aforesaid; as by the copy of the court rolls last above mentioned made thereon, now shewn and brought into this court, and given in evidence to the said jurors, more fully may appear; whereupon the said *John Ladd* entered into the said messuage and lands, with the appurtenances, last above mentioned, and was seised thereof, as the law requires. And the said jurors do, upon their said oath, further declare, that *Cicely Cook* and *Mary Cook*, named in the within declaration, are cousins and next heirs to the said *Edmund Cook* the son, and to the said *John Cook*, and to the said *Cicely Ellen* and *Alice*, daughters of the said *Edmund Cook* the elder, that is to say, daughters and heirs of *Robert Cook*, brother to the said *Edmund* the son, and to *John Cook*, which said *Robert* was the eldest son and heir to the said *Edmund Cook* the elder, grandfather of the said *Cicely* and *Mary* named in the declaration aforesaid, and father to the said *Robert* and *Edmund* the son, and *John Cook*; and that the said
John

John Ladd claims his right title and interest in the premises aforesaid, by virtue of the surrender and admission last above mentioned. And the said jurors do further declare, upon their said oath, that the said *Cicely Cook* and *Mary Cook*, named in the declaration aforesaid, after the decease of the said *John Cook* and before the said time when the lease aforesaid was made, namely, on the first day of *March* in the first year of the reign of his said present majesty, entered into the said one messuage, &c. with the appurtenances, and was seised thereof, as the law requires; [and they further found the lease entry and ouster.] And if the defendant be guilty of the trespass and ejectment, &c. then they find him so; and if not, then they find him not guilty.

§ 4. *Eastcourt v. Weeks.*

DEclare upon their oath, that the tenements, mentioned in the within written declaration, are and always have been customary tenements, and parcel of the manor of *Newton* in the county of *Wilt*s, of which said manor sir *William Eastcourt* knight was seised in his demesne as of a fee; and that one *William Weeks* was seised of the

1 Lutw. 802.
Special verdict, that the tenements are copy-hold, *William Eastcourt* seised of the manor in fee; and *William Weeks* of the copy-hold tenements, for life.

Marriage of
Weeks with
Eliz. Kite.

Death of Wil-
liam East-
court; and
descent of the
manor to
Amy East-
court and the
lessor of the
plaintiff, and
that William
Weeks per-
mitted the
messuage to
be ruinous,
and demised
for a year,
and so from
year to year,
&c.

said customary tenements for the term of his natural life, by copy of the court rolls of that manor; at the will of the lord according to the custom of the said manor; and that the said *William Weeks* being so seised of the said customary tenements, he the said *William Weeks* married one *Elizabeth Kite*, and afterwards the said *William Eastcourt* died seised, as aforesaid, of the said manor; after whose decease the manor descended to one *Amy Eastcourt*, and to the within named *Anne Eastcourt* the plaintiff's lessor, as sisters and heirs of *William Eastcourt*; and that afterwards the said *William Weeks* permitted the within mentioned messuage to be ruinous and out of repair and in decay, for want of necessary repairs thereof; and that afterwards, to wit, on the twenty-fifth day of *November*, in the year of our Lord 1690, the said *William Weeks*, by his deed shewn to the said jurors in evidence, demised all the said customary tenements to one *Edward Browne*, to have and to hold to the said *Edward Browne* from the feast of saint *Michael* then last past, for and during the term of one whole year from thence next ensuing; and so from year to year for the term of ten years then next ensuing, if the said *William Weeks* should so long happen to live, at the yearly rent of ten pounds,

to

to be paid to the said *William Weeks* for the same; and afterwards the said *Amy Eastcourt* died seised of a moiety of the said manor in her demesne as of a fee; after whose death the said moiety descended to the said *Anne Eastcourt*, as sister and heir to the said *Amy*, whereby the said *Anne Eastcourt* was, and now is, sole seised of the manor aforesaid, in her demesne as of fee: and that afterwards, on the first day of *February* in the year of our Lord 1696, the said *William Weeks* died seised, as aforesaid, of the said customary tenements: and that within the manor aforesaid there is, and for so long a time that there is no memory of any man to the contrary, there hath been, and was a custom used and approved of, that the wife of every customary tenant who died seised of any customary tenements, parcel of that manor, of any estate therein for the term of his life, hath used, and ought, to have and enjoy all such customary tenants, whereof her husband died so seised, for and during the time of her widowhood, at the will of the lord of the manor for the time being, according to the custom of that manor; and also that the executors and administrators of every such customary tenant, dying seised of such estate as aforesaid, of and in any customary

Death of
Amy East-
court, and
descent of
her moiety
to the lessor.

Death of
William
Weeks.

Custom that
the wife of
a custom-
ary tenant
dying seised
for life, shall
hold the lands
during her
widowhood;
and that the
executors of
such tenant
(if he die be-
tween Christ-
mas and
Ladyday)
shall hold
'till the next
Michaelmas.

Entry of the
lessor of the
plaintiff for
the forfei-
ture.

That the
messuage at
the time of
such entry
was out of
repair; but
it is now in
good repair.

tenements, parcel of the manor aforesaid, at any time after the feast of the birth of our Lord Christ, and before the feast of the annunciation of the blessed virgin *Mary*, hath been accustomed, and ought, to have and enjoy all such customary tenements, till the feast of *St. Michael* the arch-angel, next after the death of such customary tenant so dying seised, and no longer; and that after the several deaths of the said *William Eastcourt*, *Amy Eastcourt* and *William Weeks*, and before the feast of *St. Michael* the arch-angel next after the death of the said *William Weeks*, to wit, on the twenty-fourth day of *September*, in the year of our Lord 1697, the within named *Anne Eastcourt* lessor of the plaintiff entered in and upon all the said customary tenements, claiming the same as a forfeiture to the said *Anne*, as lady of the manor aforesaid, and was seised of the said customary tenements, as the law requires; and that the messuage aforesaid being so out of repair, continued so out of repair and in decay, for want of necessary repairing the same, till the said time of the entry made by the said *Anne Eastcourt*, as aforesaid. And the said jurors do further declare, upon their said oath, that the said messuage now is, and for the space of a month last past hath been,

been, well and sufficiently repaired, at the costs and charges of the said *Elizabeth*, who was wife of the said *William Weeks* at the time of his death, and that after the entry made as aforesaid, to wit, on the within written nineteenth day of *January*, in the ninth year of the reign of his said present majesty, the said *Anne Eastcourt* demised the said customary tenements, to the within named *John Eastcourt*, to have and to hold to the said *John*, from the last day of *December* then last, for the term of seven years from thence next ensuing; by virtue of which said demise, he the said *John* entered into the said customary tenements, and was possessed thereof, until the within named *Alice Weeks*, (as a servant to the said *Elizabeth Weeks*, who was wife to the said *William Weeks*, and by her special command) entered into the said customary tenements, in and upon the possession of the said *John*, and ejected drove out and removed him from his said farm therein, as the said *John Eastcourt* hath therein declared. And the said jurors do, upon their said oath, further declare, that the said *Elizabeth*, who was wife to the said *William Weeks* at the time of his death, now is, and ever since the death of the said *William Weeks* hath been and remained, a widow unmarried, and

Lease to the plaintiff; and entry of the defendant, as servant to *Elizabeth* the wife of *William Weeks*.

That the said *Elizabeth* is now alive, and unmarried.

and in good health. And then the jurors conclude (as usual.)

§ 5. *King v. Dilliston.*

1 show. 31. 83. d. 6
Lut. 765.
3 Mod. 221.

That the
tenements
are copyhold.

Henry War-
ner and Eliza-
beth his wife
seised (in
right of
Elizabeth)
for life.

AND the jurors of the jury, where-
of mention is within made, be-
ing called, likewise appeared, who being
chosen tried and sworn to declare the truth
of the within contents, declare upon their
oath, that the within written tenements
with the appurtenances, wherein the tres-
pass and ejectment within written are sup-
posed to have been committed, are, and
for so long a time as there is no remem-
brance of any man to the contrary have
been, parcel, and customary tenements, of
the manor of *Sweefling-Campsey* with the ap-
purtenances, in the said county of *Suffolk*;
and have been, during all that time, de-
mised and demisable by copy of the court
rolls of that manor, by the lord or lady
thereof for the time being, to any person
or persons whatsoever, willing to take the
same in fee-simple or otherwise, at the will
of the lord or lady, according to the custom
of the manor aforesaid; and that before
the within written time when the trespass
and ejectment aforesaid are supposed to have
been done, one *Henry Warner* and *Elizabeth*
his

his wife, in right of the said *Elizabeth*, were seised of the tenements within written with the appurtenances, in which, &c. in their demesne as of freehold, for the term of the life of the said *Elizabeth*, the remainder thereof belonging to *John Ballett* and his heirs, at the will of the lord, according to the custom of the manor aforesaid. And the said jurors do, upon their said oath, further declare, that within the manor aforesaid, there now is, and for so long a time as there is no memory of any man to the contrary there hath been, such a custom, that if any surrender of any customary lands or tenements of the manor aforesaid be made to the lord or lady of the said manor for the time being, out of the court of the said manor, according to the custom thereof, it should be presented by the homage of the court of the manor aforesaid, at the first court of the said manor next after such surrender, to be held at that manor; and that after such presentment, made in the manner aforesaid, the first publick proclamation should be made in the same first court, that such person who hath a right to be admitted to the tenements aforesaid, so surrendered, should appear at that court, and pray to be admitted to the customary tenements comprised in such surrender, according

Remainder to
John Ballett
in fee.

Custom that
if surrender
be presented,
the party,
having a
right, shall
be thrice pro-
claimed to
come in, and
be admitted

According to the intent and purport thereof: and if such person, who had a right to be admitted to the tenements aforesaid, so surrendered, came not at the same first court, and prayed to be admitted, nor was admitted to the tenants with the appurtenances, mentioned in such surrender as aforesaid, then at the second court of the said manor, to be held next after such surrender, another publick proclamation shall be made, that such person who hath a right to be admitted as aforesaid, should appear at that same court, and should pray to be admitted to the customary tenements, according to the intent and purpose of the surrender aforesaid: and if such person, who had a right to be admitted as aforesaid, came not at such second court, and prayed to be admitted, nor was admitted, to the tenements with the appurtenances, mentioned in such surrender as aforesaid, then at the third court of the said manor, next after such surrender, held at the manor aforesaid, there should be another publick proclamation made, that such person, who had a right to be admitted as aforesaid, should come at the same third court, and pray to be admitted to the tenements mentioned in such surrender: and if such person came not at that court,
and

and prayed to be admitted, nor was admitted, to the said tenements with the appurtenances, then the steward of the said court for the time being commanded, and by the custom of the manor aforesaid therein used and approved of for so long a time as there is no remembrance of any man to the contrary, hath used to command, the bailiff of the said manor for the time being, to seize such tenements so surrendered, into the hands of the lord or lady of the said manor for the time being. And the said jurors do, upon their said oath, further declare, that the said *Henry Warner* and *Elizabeth*, in right of the said *Elizabeth*, being seised of the tenements within written with the appurtenances, wherein, &c. in the manner aforesaid, and the remainder thereof belonging to the said *John Ballet* and his heirs in the manner aforesaid, they the said *Henry Warner* and *Elizabeth* and *John Ballet*, before the within written time when, &c. that is to say, on the sixth day of *April*, in the thirty-fourth year of the reign of his late majesty, surrendered out of court, according to the custom of the manor aforesaid, into the hands of the said *Alice*, then lawfully being the lady of the manor aforesaid, the within written tenements with the appurtenances, wherein,

And if he will not come in upon the third proclamation, the premises are to be seised, to the use of the lord.

Surrender of *Henry Warner* and *Elizabeth*, and *John Ballet*, into the hands of the lessor of the plaintiff, the being lady of the manor.

&c.

To the use of
Robert Free-
man and his
heirs.

Death of
Robert Free-
man before
any court,
(John Free-
man, his son
and heir
within age.)

Presentment
of the surren-
der.

§c. to the use of one *Robert Freeman* and his heirs for ever; and that the said *Robert Freeman* after the surrender made in the manner aforesaid, and before any court of the said manor was held after making the said surrender, that is to say, on the first day of *August* in the thirty-fourth year of the reign of his said late majesty, died; and that one *John Freeman* was and is the only son and heir of the said *Robert Freeman*, and, as such son and heir of the said *Robert*, had a right to be admitted to the tenements aforesaid with the appurtenances, wherein, &c. according to the form and effect of the said surrender, made in the manner aforesaid. And the said jurors do, upon their said oath, further declare, that the said *John Freeman*, at the time of the death of the said *Robert Freeman* his father, was and now is within the age of twenty one-years; and the said *John Freeman* being within the age of twenty-one years, and he the said *John Freeman* having a right to be admitted to the tenements aforesaid, with the appurtenances, under the said surrender, made by the said *Henry Warner* and *Elizabeth* and *John Ballett* into the hands of the said *Alice* as aforesaid, afterwards, that is to say, at the court of the manor aforesaid, next after the said surrender made as aforesaid, held at that manor on the fifth day of
September,

September, in the thirty-fourth year of the reign of his said late majesty, was duly and according to the custom of the manor aforesaid, presented by the homage of the same court; and immediately after such presentment of the said surrender, made in the same court by the homage aforesaid, the first publick proclamation was made in the same court, that such person, as had a right to be admitted to the tenements aforesaid with the appurtenances, should come at the same court there held as aforesaid, and pray to be admitted to the said tenements, surrendered as aforesaid; and that he appeared not at the same court, nor was admitted to the said tenements; whereupon afterwards, at the second court of the said manor next after the said surrender made as aforesaid, held at that manor on the thirteenth day of *June* in the thirty-fifth year of the reign of his said late majesty, another publick proclamation was made in the same court, that such person as had a right to be admitted to the said tenements, should come at the same court there held as aforesaid, and pray to be admitted to the said tenements, surrendered as aforesaid; and that no person came at that same court, nor was admitted to the said tenements with the appurtenances; whereupon afterwards, at the third court of the manor aforesaid,

First proclamation.

First default.

Second proclamation.

Second default.

Third proclamation.

Third default.

Mandate to
seize the
lands.

aforesaid next after making the said surrender as aforesaid, held at that manor, on the twenty-third day of *October* in the said thirty-fifth year of the reign of his said late majesty, another publick proclamation was made in the same court, that such person as had the right to be admitted to the said tenements, surrendered as aforesaid, should come at that same court, there held as aforesaid, and pray to be admitted to the said tenements, surrendered as aforesaid; and that no person came at the same court, nor was admitted to the said tenements, with the appurtenances; whereupon one *Thomas Clarke*, then bailiff of the said manor, was commanded by the steward of the manor aforesaid, that he should seize the said tenements with the appurtenances, into the hands of the said *Alice* then lady of the manor aforesaid: which said *Thomas Clarke*, afterwards, that is to say, on the first day of *November* in the thirty-fifth year aforesaid, entered into the said tenements with the appurtenances, by virtue of the said mandate. And the said jurors do, upon their said oath, further declare, that the said *Alice* was at the time when the said surrender was made, and ever since hath been, and now is, lady of the manor aforesaid, and thereof legally seised: and that after the said several proclamations, and

and the several defaults made as aforesaid, and before the making of the within written demise, that is to say, on the first day of *April* in the first year of the reign of his said present majesty within specified, she the said *Alice* being lady of the said manor, and the said *John Freeman* then and now being of the age of twenty-one years, she the said *Alice* entered into the tenements within specified, with the appurtenances, wherein, &c. as forfeited to her, for the reason aforesaid, and was thereof seised as the law requires; "and then they find the lease, "entry, and ouster; and if the defendant "be guilty of the trespass and ejectment, "then they find him so; and if not, then "they find him not guilty."

Entry for the
Forfeiture.

§ 6. *Hunt v. Bourne* and others.

Comyns 93. d. 6.
DEclare upon their oath, that *Thomas Andrews*, on the fourteenth day of *February*, in the fourteenth year of the reign of his late majesty *James* the first, late king of *England*, &c. was seised of the lands and tenements mentioned in the within written declaration, in his demesne as of fee; and being so seised thereof, he the said *Thomas Andrews*, by a certain indenture bearing date on the fourteenth day of *Fe-*
T *bruary*,

Lutw. 770.
Thomas An-
drews seised
in fee;

conveys the
premises by
indenture,

bruary, in the said fourteenth year of the reign of the said late king *James the first*, executed between the said *Thomas Andrews*, by the name of, &c. of the one part, and *Toby Pavie*, of, &c. and *Philip Andrews* of, &c. of the other part, for the considerations mentioned in the same indenture, gave, granted, enfeoffed, and confirmed to the said *Toby Pavie* and *Philip Andrews*, and their heirs, the said lands and tenements, to the several uses declared and specified in the same indenture, that is to say, to the use of the said *Thomas Andrews* and *Eleanor* his wife for the term of their natural lives, and the life of the longest liver of them, without impeachment of waste during the life of the said *Thomas Andrews*; and after their decease, then to the use of one *Mary Andrews*, mentioned in the said indenture, daughter of the said *Thomas Andrews*, and of the heirs of the body of the said *Mary*, begotten or to be begotten by one *John Gwillim* the younger, mentioned in the said indenture; and for default of such issue, then to the use of the heirs begotten on the body of the said *Mary*; and for default of such issue, then to the use of one *Elizabeth Tomkins*, another daughter of the said *Thomas Andrews*, and the heirs begotten of the body of the said *Elizabeth*;

to the use of himself and his wife, for life; remainder to *Mary Andrews*, his daughter, in special tail; remainder to the said *Mary Andrews*, in general tail;

remainder to *Elizabeth Tomkins*, another daughter, in general tail; remainder to *William Tomkins*, the

Elizabeth; and for default of such issue, then to the use of *William Tomkins*, eldest son of the said *Elizabeth Tomkins*, and of the heirs begotten of the body of the said *William Tomkins*; and for default of such issue, then to the use of *John Tomkins*, second son of the said *Elizabeth*, and of the heirs of the body begotten of the body of the said *John Tomkins*; and for default of such issue, then to the use of the right heirs of the said *Thomas Andrews* for ever; as in the said indenture it is more fully contained. And the said jurors, do, upon their said oath, further declare, that by virtue of the said indenture, and also by force of the statute for transferring uses into possession, published in the parliament of *Henry* the eighth, late king of *England*, &c. held at *Westminster*, on the fourth day of *February*, in the twenty-seventh year of his reign, they the said *Thomas Andrews* and *Eleanor* his wife became seised of the said lands and tenements, mentioned in the said declaration, in their demesne as of freehold, for the term of their natural lives, the remainder thereof as in the manner above limited; and that after making the said indenture, the said *John Gwillim* the younger married the said *Mary Andrews*, and had issue begotten between them, one *Thomas Gwillim* their eldest son; and that after-

eldest son of the said *Elizabeth*, general tail.

Remainder to *John Tompkins*, another son of said *Elizabeth*, in general tail; remainder to the right heirs of *Thomas Andrews*.

Marriage of *J. Gwillim* with *M. Andrews* who had issue, *T. G.*

Death of
T. A. and
his wife.

Entry of J.
G. and M.
his wife.

Death of J.
G. and his
wife.

Entry of T.
G. their son
and heir.

who had issue
T. G.

That the
tenements
are held of

wards, and before the said twenty-ninth day of May in the year of our Lord 1646, they the said *Thomas Andrews* and *Eleanor* his wife died; and that after their decease, the said *John Gwillim* the younger and *Mary* his wife entered into the lands and tenements above mentioned in the said declaration, and were seised thereof, in right of the said *Mary*, in their demesne as of fee-tail, that is say, to the said *Mary* and the heirs of her body begotten by the said *John Gwillim* the younger, remainder thereof in the manner above limited; and being so seised thereof, they the said *John Gwillim* and *Mary* his wife, afterwards and before the said twenty-ninth day of May in the year of our Lord 1646, died; and after their decease the said *Thomas Gwillim*, as son and heir of the said *Mary*, begotten of her body by the said *John Gwillim* the younger, entered into the lands and tenements, with the appurtenances, and was thereof seised in his demesne as of fee-tail, the remainder thereof in the manner above limited; and being so seised thereof, he the said *Thomas Gwillim* had issue begotten of his body, one *Thomas Gwillim* his son. And the said jurors do upon their said oath, further declare, that the said messuage lands and tenements, above specified in the said declaration, and also divers

divers other messuages lands and tenements, within the said parish of *King's Caple*, are held of the said manor of *Wormelaw*, in the said county of *Hereford*, which said manor now is, and for so long time as there is no remembrance of any man to the contrary, hath been, of antient demesne of our sovereign lord and lady, the king and queen of *England*, and their predecessors, kings and queens of *England*; and that the said tenements have been, during all that time, pleadable and impleaded in the court of the said manor or hundred, by their majesty's inferior writ of right close, before the steward suitors and domesmen of the said manor and hundred, or their deputies, or attornies; and not elsewhere, nor otherwise; and by an antient custom of the said manor and hundred, time out of mind therein used and approved of, the fines founded upon writs of right close of messuages lands meadows pastures furze and heath, within and being held of the said manor or appertaining thereto, have been levied; and during the time aforesaid have been used and accustomed to be levied, in the said court of the manor aforesaid; and that a certain fine, produced in evidence to the said jury, was levied in the court of the right honorable the lady *Elizabeth*,

the manor of *Wormlow*, which is antient demesne,

and pleadable by writ of right close, before the steward, etc. of the manor.

That fines are levied in that court.

That a fine *sur concessio* was accordingly levied of the pre-

uses, by
Thomas
Gwillim the
father, and
his wife,

to W. N. and
S. his wife,
and J. N.
their son, for
their lives,

reserving an
annual rent
of six pounds.

countess of *Kent*, then lady of her manor
or hundred of *Warmelote* aforesaid, whereof,
&c. held at *King's Court*, within the manor
or hundred aforesaid, according to the said
custom time out of mind used and approved
of within the said manor, on the twenty-
ninth day of *May*, in the twenty-second year
of the reign of his late majesty *Charles* the
first, king of *England*, &c. before, &c.
then suitors and domestics of the said court,
and others of his said majesty's subjects,
then present there, between *William Nurse*
Sarah his wife and *John Nurse* their son;
plaintiffs, and the said *Thomas Gwillim* the
father and *Mabell* his wife deforcians, of
the said messuages lands and tenements,
mentioned in the said declaration; by which
said fine, the said *Thomas Gwillim* the father
granted to the said *William Nurse* and
Sarah his wife, and to *John Nurse*, son of
the said *William* and *Sarah*, the lands and
tenements aforesaid, above mentioned in
the said declaration, being held of the
manor aforesaid, for the term of the lives
of the said *William Nurse* and *Sarah* his
wife, and of the said *John Nurse*, and
of the life of the longer liver of either of
them, thereby reserving an annual rent
of six pounds, during the said term, as
it is more fully comprehended in the said
fine;

fine; the tenor of which fine follows in these words. "*Wormelow, ff.* This is a final agreement; &c. [Set forth the fine, *in hac verba.*] But the said jurors do, upon their said oath, further declare, that the said messuage lands and tenements, mentioned in the said fine, were not usually demiseable, at the time of levying the fine aforesaid; and that the said annual rent, reserved by the said fine as aforesaid, was not the antient rent of the said tenements: by virtue of which said fine, they the said *William Nurse* and *Sarah* his wife and *John Nurse* entered into the lands and tenements aforesaid, and were seised thereof, as the law requires; and being so seised thereof, he the said *Thomas Gwillim* the father, being seised of the reversion of the messuage lands and tenements aforesaid, a certain other fine, produced in evidence to the said jurors, was levied in the said court of the right honourable the lady *Elizabeth*, countess of *Kent*, then lady of her said manor or hundred of *Wormelow*, held at *Polston* in the parish of *King's Caple*, within the jurisdiction of that court, according to the custom aforesaid, used and approved of within the said manor, during the whole time aforesaid, on *Friday* the second day of *June*, in the twenty-fourth year of the reign

The fine in
hac verba.

That the premises at the time of the fine, were not usually demiseable, nor was the rent reserved the antient rent.

Entry of the
conuzees.

T. G. the father, being seised of the reversion, he and his wife levied a fine thereof,

to Thomas
Marrett.

The fine in
hac verba.

That the last
fine was levi-
ed to the use
of T. G. the
father.

of our said late sovereign lord *Charles* the first, late king of *England*, &c. before, *then* suitors and domesmen of the said court, and others of his said majesty's subjects then present there, between one *Thomas Marrett* plaintiff, and the said *Thomas Gwillim* and *Mabell* his wife, deforciant, of the said messuage lands and tenements, mentioned in the said declaration; by which last mentioned fine, the said *Thomas Gwillim* and *Mabell* granted to the said *Thomas Marrett*, and his heirs, the said messuage lands and tenements, mentioned in the within written declaration, as in the said fine it is more fully expressed; the tenor of which said fine, follows in these words, "*Wormelow*, ff. " This is a final agreement" [Set forth the fine, in *hac verba*.] And the said jurors do, upon their said oath, further declare, that the last mentioned fine was so levied to the use of the said *Thomas Gwillim* the father, his heirs and assigns for ever: by virtue of which said fine, and also by force of the said act for transferring uses into possession, the said *Thomas Gwillim* was seised of the said tenements, specified in the within written declaration, as the law requires; and being so seised thereof, by a certain indenture, produced in evidence to the said jurors, bearing date on the

A P P E N D I X.

the first day of *November*, in the twenty-fourth year of the reign of his said late late majesty, *Charles* the first, late king of *England*, executed between the said *Thomas Gwillim* the father, by the name of, &c. of the one part, and *Thomas Payne*, of, &c. of the other part, he the said *Thomas Gwillim* the father, for the considerations mentioned in the same indenture, enfeoffed bargained and sold to the said *Thomas Payne*, and his heirs, the said messuage lands and tenements, mentioned in the said indenture, and the said jurors do upon their said oath further declare, that the said last mentioned indenture was enrolled of record in the county of *Hereford*, among the records of the same county, according to the direction of the statute in such case made and provided, before *Thomas Baskerville* esquire, then one of the justices, assigned to keep the peace in and for the said county of *Hereford* and *Miles Hill* gentleman, then clerk of the peace of the said county, within six months next after making the said indenture, that is to say, on the fifteenth day of *March*, in the year of our Lord, 1648. by virtue of which said bargain and sale, and also by force of the said act for transferring uses into possession, the said *Thomas Payne* was seised of the said reversion

Conveyance
from T. G.
the father,
by bargain
and sale en-
rolled to
Thomas
Payne, and
his heirs,

agmodT or
Whitcomb
the said
to the
said
said
said

The said
said
The said
the said
the said
the said
the said
the said

sion

Release of
Thomas
Gwillim the
father to said
Thomas
Payne and
his heirs.

tion of the tenements, mentioned in the said declaration, as of fee and right, as the law requires. And the said jurors do upon their said oath further declare, that the lands and tenements aforesaid, mentioned in the declaration aforesaid, and the said lands and tenements in the said last mentioned fine, are the same, and not different or separate lands and tenements; and they do further declare, that by a release produced in evidence to the said jury bearing date on the nineteenth day of *November* in the year of our Lord 1649, he, the said *Thomas Gwillim* for the considerations therein mentioned, gave granted remised released and quit claimed, to the said *Thomas Payne* (being seised of the reversion of the said tenements in the manner aforesaid) and to his heirs, all the title interest term and demand whatsoever of the said *Thomas Gwillim*, in the lands and tenements, mentioned in the said release, being the lands and tenements mentioned in the said declaration, as in the same release it is more fully expressed; the tenor of which release follows in these words, To all to whom this present writing shall come, &c. [set forth the release, *in hac verba.*] And the said jurors do upon their said oath further declare, that afterwards, namely on the twentieth day of *June*

in

in the year of our Lord 1663, the said *Thomas Gwillim* the father died; and that the said *Thomas Gwillim* the younger, being then of the full age of twenty-one years, was son and heir of the said *Thomas Gwillim* the father; and that the said *Thomas Gwillim* the younger had issue, begotten of his body, the said *Richard Gwillim* the lessor of the premises; and that the said *Thomas Gwillim*, the father of the said *Richard*, afterwards and before the time of the demise in the said declaration, above supposed to have been made, died; and that the said *Richard Gwillim* is son and heir to the said *Thomas Gwillim* his father, and nephew and heir to the said *Mary Andrews*, lawfully issuing from her body, and the said jurors do upon their said oath further declare, That the said *Thomas Payne* being seised, in the manner aforesaid, of the said reversion, of the tenements specified in the said declaration, he the said *Thomas Payne*, afterwards, and before the time of the demise supposed in the declaration aforesaid, namely, on the twentieth day of *September* in the year of our Lord 1661, died so seised thereof; after whose decease, the said reversion of the same tenements descended to one *John Payne*, as son and heir of the said *Thomas Payne*; whereby the said *John Payne* became

Death of T. G. the father, leaving T. G. the son of full age,

who had issue the lessor of the plaintiff.

Death of T. Payne, and descent of the reversion to John Payne, his son and heir.

Death of J.
Payne with-
out issue, and
descent of
the rever-
sion to the
defendant,
as co-heir.

That Tho-
mas Payne,
and his heirs,
received the
annual rent,
etc.

came seised of the said reversion of those tenements, as of a fee and right, as the law requires: and being so seised thereof, the said *John Payne* afterwards, and before the time of the demise supposed in the said declaration, namely, on the twenty-eighth day of *December* in the year of our Lord 1661, died without issue springing from his body, being seised of such his estate, in the manor aforesaid: after whose decease the said reversion of the tenements aforesaid descended to the said *Margaret* wife of the said *Edward*, to *Mary* the wife of the said *Andrew*, and to *Mary Meyrick*, as co-heirs of the said *John Payne*; whereby the said *Edward* and *Margaret* his wife, in right of the said *Margaret*, and the said *Andrew* and *Mary* his wife, in right of the said *Mary* and the said *Mary Meyrick*, were seised of the said reversion of the tenements aforesaid, as of a fee and right, as the law requires; and that the said *Thomas Payne* during his life and after making the said indenture of bargain and sale enrolled as aforesaid, and after his decease the said *John Payne*, in his life time, and after his decease the said *Edward Margaret Andrews* and *Meyrick* respectively received, and quietly enjoyed, the said annual rent of six pounds reserved as aforesaid, during the continuance of the said grant and demise,

demise, made for three lives as afore said.
 And the said jurors do, upon their said
 oath, further declare, that the said *Mary*
Nurse survived the said *William Nurse* and
John Nurse, who died seised of the said
 tenements, specified in the said declara-
 tion; and that she the said *Sarah* died on
 the seventeenth day of *September* in the year
 of our Lord 1693, seised of the said tene-
 ments, specified in the said declaration as
 afore said; and that after the decease of the
 said *Sarah*, the said *Edward Bourne* and
Margaret, in right of the said *Margaret*,
 the said *Andrew* and *Mary*, in right of the
 said *Mary*, and the said *Mary Meyrick*, en-
 tered into the said messuage lands and tene-
 ments, mentioned in the declaration afore-
 said, and were seised thereof, as the law re-
 quires; and that afterwards, and before the
 time of the demise above mentioned in the
 said declaration, the said *Richard Gwillim*
 entered into the said messuage lands and tene-
 ments, above mentioned in the within writ-
 ten declaration, and was seised thereof, as
 the law requires; he the said *Richard* then
 and yet being within the age of twenty-one
 years. They further find the lease entry and
 ouster and if, &c. (with the general con-
 clusion.)

Death of the
Survivors of
the three
lesses.

Death of
Sarah Nurse
the said
Sarah Nurse
died on the
seventeenth
day of Sep-
tember in the
year of our
Lord 1693

Entry of the
defendants,
and of the
lessor, (being
within age.)

Richard Gwillim
entered into the
said messuage
lands and tene-
ments, and was
seised thereof,
as the law re-
quires.

Judgment

*Judgment for the plaintiff after a verdict
on a trial at bar; and a writ of pos-
session awarded, with the return there-
of.*

Jud. 74.

AT which day, the jury aforesaid being respited between the parties aforesaid, in the said action, &c. And now here, at this day, cometh as well the said plaintiff as the said defendant by their attornies aforesaid, and the jurors impannelled being called, likewise came, who being elected tried and sworn to declare the truth of the premises, as to the trespass and ejectment aforesaid, in ten acres of land and eighty-four acres of wood in W. aforesaid, parcel of the tenements aforesaid, above supposed to be done, they declare upon their oaths, that the said (defendants) are thereof guilty, as the said plaintiff hath above thereof complained against them; and they assess the damages of him the said plaintiff occasioned by the said trespass and ejectment, besides his costs, &c. to ten shillings; and for those costs and charges to twenty marks; and as to the residue of the trespass and ejectment aforesaid, in the residue of the tenements aforesaid with the appurtenances, above supposed to be done, the jurors aforesaid do further declare,
upon

upon their said oath, that the defendant is in no wise guilty thereof, as the said defendants have above alledged; therefore it is adjudged, that the said plaintiff do recover against the said defendants, her term aforesaid, yet to come, of and in the said ten acres of land and eighty-four acres of wood, with the appurtenances, in *W.* aforesaid, wherein the said defendants are by the jurors aforesaid above found to be guilty of the trespass and ejectment aforesaid; and his damages aforesaid, assessed by the jurors aforesaid, in the manner aforesaid; and also twenty-one pounds three shillings and four-pence, at his request, &c. which said damages in the whole do amount to — and be the said defendants taken, &c. And be the said plaintiff amerced for his false plaint against the said defendants, for the residue of the trespass and ejectment aforesaid, whereof the said defendants are above acquitted by the said jurors. And the said defendants may go thereof, without day, for ever dismissed, &c. And hereupon the plaintiff prayeth a writ, &c. And it is granted to him returnable here, on the morrow of the *Holy Trinity*, &c. At which day the said plaintiff comes here by his attorney aforesaid, and the sheriff, that is to say, *M. W.* knight and baronet, now returneth that

that he by virtue of the writ aforesaid to him directed, did, on the eleventh day of *June* last past, cause the said plaintiff to have his possession of his term aforesaid, of and in the tenements aforesaid, with the appurtenances, yet unexpired, as by the writ aforesaid he was commanded, &c.

Judgment by nil dicit.

2 T. Jud.
117.

AND the said defendant by *A. B.* his attorney, comes and defends the force and injury, &c. and hereupon the said plaintiff prays that the said defendant may answer to the said declaration; and the said defendant says nothing thereto in bar, or to preclude the said plaintiff from his action, but makes default; whereby the said plaintiff remains against the said defendant undefended: wherefore it is considered, that the said plaintiff do recover against the said defendant his possession of the said term yet to come, of and in the said tenements with the appurtenances, and his damages occasioned by the trespass and ejectment aforesaid: but because it is unknown what damages the plaintiff hath sustained, by reason of the trespass and ejectment aforesaid, the sheriff is commanded, that by the oath of twelve honest and lawful men of his bailiwick, he diligently

diligently inquire what damages the plaintiff hath sustained, as well by reason of the said trespass and ejectment, as for his costs and expences, laid out by him about his suit in that behalf; and that he cause the inquisition which he shall take, &c. to be made apparent to our sovereign lord the king at *Westminster*, in three weeks from the day of *St. Michael*, under the seal, &c. and the seals, &c. the same day is given to the said plaintiff; and thereupon the said plaintiff prays his majesty's writ of possession, &c. (as hereafter.)

Judgment by non sum informatus.

AND the said *C.* by *B. T.* his attorney, comes and defends the force injury and damages, and whatever else he ought to defend, where and when the court will consider thereof; and hereupon the said *A.* prays that the said *C.* may make answer to his said declaration: upon which the said *E.* says, that he is not instructed by his client, the said *C.* to give any answer to the above complaint of the said *A.* nor says he any thing in bar, or to preclude the said *A.* from his said action; whereby the said *A.* remains against the said *C.* undefended therein. For which reason it is considered, that the said

2 T. Jud.
116.

U

A.

A. to recover against the said *C.* his possession of the said term, yet to come, of and in the said tenements, with the appurtenances, and his damages occasioned by the said trespass and ejectment: but because it is unknown what damages the said *A.* hath sustained by reason of the said trespass and ejectment, the sheriff is commanded that he diligently enquire, by the oaths of twelve honest and lawful men of his bailiwick, what damages the said *A.* hath sustained, as well by reason of the said trespass and ejectment, as for his expences and costs laid out by him about his suit in that behalf; and that the sheriff cause the inquisition, which he shall take thereon, to be before our sovereign lord the king [if by original, on a general return day, if by bill, on a day certain] under his seal, and the seals of those by whose oaths he shall take such inquisition: the same day is given to the said *A.* to be here, before our sovereign lord the king. And thereupon the said *A.* prays a writ of our said sovereign lord the king, to be directed to the sheriff of the said county, to cause him to have the possession of his said term, of and in the said tenements, with the appurtenances, yet to come; and it is granted to him returnable here, at the time aforesaid, &c.

A P P E N D I X.

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*A judgment by non sum informatus, with
a remittitur damna.*

AND the said *Matthew Dimock*, by *John Lilly* his attorney, comes and defends the force injury and damages, and whatever else he ought to defend, where and when the court will consider thereof; and hereupon the said *James Hicks* prays that the said *Matthew* may make answer to his said declaration; upon which the said attorney, for the said *Matthew*, saith, he is not instructed by the said *Matthew* his client, to give any answer to the said complaint of the said *James*, nor says any thing in bar or to preclude the said *James* from his said action, whereby the said *James* remains against the *Matthew* undefended therein: therefore it is considered, that the said *James* do recover his said term of and in the said tenements, with the appurtenances, against the said *Matthew*, and his damages occasioned by the said trespass and ejectment, to be awarded to him, &c. And the said *James* of his own accord, remits and releases to the said *Matthew*, all such damages so awarded to him: therefore the said *Matthew* is acquitted of all such damages. And the said *James* prays a writ of our said sove-

reign lord the king, to be directed to the sheriff of the said county, to cause him, to have the possession of his said term yet unexpired, of and in the said tenements, with the appurtenances, and it is granted to him, returnable before our said sovereign lord the king, [if by bill, on a day certain; if by original, on a general return day, whereforever he shall then be in *England*] the same day is given to the said *James* to be here, &c.

Judgment by relicta verificatione.

2 T. Jud.
120.

AT which day came here the parties aforesaid, &c. And hereupon the defendant doth relinquish his averment aforesaid, &c. (as in other actions) nor but that he is guilty of the trespass and ejectment aforesaid, as the said plaintiff hath above complained against him; therefore it is considered, that the said plaintiff do recover against the said defendant, his term aforesaid, of and in the tenements aforesaid with the appurtenances, yet unexpired; and his damages occasioned by the trespass and ejectment aforesaid: but because it is unknown what damages, &c. under the seal, &c. and the seals, &c.

Judgment

Judgment for the plaintiff for part.

Therefore it is considered, that the said plaintiff do recover against the said defendant, his term aforesaid, of and in the said two hundred and sixty acres of wood, with the appurtenances; forasmuch as the said defendant is, by the jurors aforesaid, above found to be guilty of the trespass and ejectment aforesaid: and his damages aforesaid, assessed by the said jurors to forty-one shillings, &c. and also six shillings, awarded by this court to the said plaintiff at his request, &c. which said damages in the whole amount to eight pounds twelve shillings; and be the said defendant taken, &c. And be the said plaintiff amerced for his false complaint against the said defendant, for the residue of the trespass and ejectment aforesaid, whereof the said defendant is above acquitted by the jurors aforesaid; and the said defendant may go hence, thereof for ever dismissed, &c. and hereupon the said plaintiff prayeth a writ of our sovereign lord the now king, to be directed to the sheriff of the county, to cause him to have his possession of his term aforesaid yet unexpired, of and in the said two hundred and sixty acres of wood, with the appurtenan-

2 T. Jud.

119, 120.

ces, and it is granted to him returnable here in eight days of St. Hilary, &c.—

*Similar judgment; with a remittitur
damna.*

Afterwards the process being continued between the parties aforesaid, in the said action, the jurors were therefore respited between them here, until this day, that is to say in fifteen days from the feast of Easter, in the sixth year of the reign of our sovereign lord the king; unless, &c. And now, &c. afterwards, &c. And hereupon the said P. here in court, freely remits to the said R. R. and A. the said six pence for the damages aforesaid, assessed by the said jurors in the manner aforesaid. And also the increase of the same to be awarded to him; therefore it is considered that the said P. do recover against the said R. R. and A. his term aforesaid, of and in the tenements aforesaid with the appurtenances, yet unexpired, forasmuch as by the jurors aforesaid, the said R. R. and A. are above found to be guilty of the trespass and ejectment aforesaid; and it is also considered, that the said P. do recover against the said R. R. and A. the said fifty-three shillings and four pence, assessed by
the

the said jurors in the manner aforesaid, and also seven pounds six shillings and eight pence, awarded by this court to the said P. at his request, &c. which said costs and damages in the whole do amount to ten pounds: and be the said R. R. and A. taken, &c. and be the said P. amerced for his false complaint against the said R. R. and A. of the residue of the trespass and ejectment aforesaid, whereof the said R. R. and A. respectively are acquitted by the said jurors. And the said R. R. and A. of the residue of the trespass and ejectment aforesaid, and of the said six-pence for the damages aforesaid, assessed by jurors in the manor aforesaid, may go hence thereof for ever dismissed, &c. And hereupon, &c.

Judgment against several defendants, of several parcels of land; and several damages found, and costs against all.

AT which day the jurors, &c. Afterwards, &c. Therefore it is considered that the said plaintiff do recover against the said T. B. his term aforesaid, yet unexpired, of and in one messuage, eight acres of meadow, and seven acres of pasture, with the appurtenances, (wherein the said defend-

2 T. Jud.
120, 122.
Jud. 76.

ants are by the said jurors above found to be guilty of the trespass and ejectment aforesaid; and his damages occasioned by that trespass and ejectment, done to the said plaintiff by the said T. in the manner aforesaid; besides his costs and charges aforesaid, assessed by the jurors aforesaid, to two pence in the manner aforesaid: and against the said I. his term aforesaid, yet unexpired, of and in the said one cottage, with the appurtenances (wherein the said I. is by the said jurors above found to be guilty of the trespass and ejectment aforesaid); and his damages occasioned by that trespass and ejectment done to the said plaintiff, by the said I. in the manner aforesaid; besides his costs and charges aforesaid, assessed by the jurors aforesaid to two pence in the manner aforesaid: [and so against the rest of the defendants, where there are several ejectors.] And it is also considered that the said plaintiff do recover against the said T. and I. his damages, costs and charges by him, &c. likewise assessed to the said forty shillings, in the manner aforesaid; and also eight pounds adjudged to the said plaintiff at his request for his costs, &c. which said damages costs and charges, besides the several damages aforesaid, in the whole amount to ten pounds. And that the said T. and I. be taken, &c. And be the said plaintiff amerced

ed for his false plaint against the said T. and I. of the residue of the trespass and ejectment aforesaid, whereof the said T. &c. are by the jurors aforesaid above acquitted, and the said T. and I. &c. may depart the court here, therefrom for ever dismissed: And hereupon the said plaintiff prayeth a writ of our sovereign lord the king, to be directed to the sheriff, &c.

Judgment, where one of the defendants was found not guilty, as to part; and the others, not guilty as to all.

BE the said L. taken, &c. and be the said plaintiff amerced for his false complaint against the said T. for the residue of the trespass and ejectment aforesaid, and against C. and R. of the whole trespass and ejectment aforesaid, whereof the said T. C. and R. are by the said jurors wholly acquitted, and the said T. C. and R. may go hence thereof for ever dismissed, &c. and hereupon, &c.

Ibid. 123.
Jud. 82.

Judgment for the plaintiff, where the term is expired.

AT which day the jurors, &c. Afterwards, &c. And because the justices here will advise themselves, [and so continue

2 T. Jud.
117.
Jud. 82.

nue it till the term of which judgment is entered]. At which day came here, as well the said *R.* as the said *L.* by their attornies aforesaid, and hereupon the premises being seen, and by the justices here fully understood, for that it sufficiently appeareth to this court here, that the said term of three years is fully past, it is considered that the said *R.* do recover against the said *L.* his damages aforesaid, assessed by the said jurors to forty shillings, &c. and also, &c. which said damages in the whole amount to seven pounds: and be the said *L.* taken, &c.

Judgment by default on a Scire Facias.

BUT made default; therefore it is considered, that the said *John Jones*, have his possession of the said term, yet to come, of and in the several tenements aforesaid, with their appurtenances, and also his execution against the said *A.* for his damages, according to the force, form, and effect of the said recovery, by the default of the said *Arthur*, &c.

*Writ of habere facias possessionem;
with a fieri facias for the costs.*

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the Sheriff of Oxford, greeting: Whereas *Richard J.* lately in our court before us at *Westminster*, by our writ, [if by original; if by bill, then by bill without our writ and by the judgment of the same court,] recovered against *T. B.* late of *London*, yeoman, his term, yet unexpired, of and in six messuages, &c. [the premises recovered] with the appurtenances, in the parish of *Stanton Harcourt*, in your county; and also of and in the rectory of *Stanton Harcourt*, with the appurtenances, in your county, which one *W. M.* on the seventh day of *April*, in the second year of our reign, demised to the said *Richard* for a term of years which is not yet expired, that is to say, from the first day of the same month of *April*, to the full end and term of ten years then next following, and fully to be compleat and ended; by virtue of which said demise, the said *Richard* entered into the said rectory and tenements, with the appurtenances, and was thereof possessed,
until

until the said *Thomas* afterwards, that is to say, on the same seventh day of *April*, in the said second year of our reign, with force and arms entered into the said rectory and tenements, with the appurtenances, in and upon the possession of the said *Richard* thereof, and ejected drove out and removed the said *Richard* from his said farm, the said term then and yet being unexpired, and did and still doth withhold the possession of the same from the said *Richard*; whereof the said *Thomas* is convicted, as appears to us of record; and forasmuch as it is adjudged in our same court before us, that the said *Richard* have execution upon his said judgment against the said *Thomas*, according to the force form and effect of the said recovery; therefore we command you, that without delay you cause the said *Richard* to have his possession of his said term, yet unexpired, of and in the said rectory and tenements, with the appurtenances; and in what manner you shall have executed this precept, do you make appear to us, in three weeks from the day of saint *Martin*, wherever we shall then be in *England*. We likewise command you, that you cause to be made ten pounds and six pence of the goods and chattels of the said *T.* in your bailiwick, which were awarded to the said

R.

R. in our same court for his damages which he sustained by reason of the said trespass and ejectment; and have you those monies before us at the same time, wherever we shall then be in *England*, to render to the said *R.* for his damages aforesaid, whereof the said *T.* is convicted; and have there this writ. Witness *William earl Mansfield*, at *Westminster*, the twenty-third day of *October*, in the sixth year of our reign.

Writ of possession on a judgment by bill in the court of King's Bench; with a Ca' Sa' for the damages.

TO the sheriff of *Suffolk*, greeting:
Whereas *A. F.* esquire, lately in our court before us, by bill without our writ and by the judgment of the same court, recovered against *R. H.* gentleman, his term, yet unexpired of and in a messuage or tenement called *B.* with the appurtenances, in *S.* in your county, ann also two hundred acres of land with the appurtenances, in *S.* aforesaid, which *I. T.* and *W. P.* on the sixth day of *September*, in the fourth year of our reign, demised to the said *A.* for a term of years which is not yet past, that is to say, from the feast of saint *Michael* the archangel, in the said fourth year

year of our reign, to the full end and term of five years, from thence next ensuing, and fully to be compleat, and ended; he the said *R.* afterwards, that is to say, on the twenty-eighth day of *October*, in the fifth year of our reign, entered, with force and arms, into the messuago and tenements aforesaid with the appurtenances, and expelled and ejected the said *A.* therefrom; therefore we command you, that, without delay, you cause the said *A.* to have his possession, yet unexpired, of and in the messuage or tenement above specified; and in what manner you shall execute this our writ, do you make appear to us at *Westminster*, on *Wednesday* next after the morrow of saint *Martin*. We likewise command you, that you take the said *R. H.* if he be found in your bailiwick, and safely keep him, so that you have his body before us, at *Westminster*, at the day aforesaid, to make satisfaction to the said *A.* for five pounds ten shillings, for his damages which he has sustained, as well by reason of the trespass and ejectment aforesaid, as for his expences laid out by him about his suit in this cause; whereof the said *R.* is convicted, as it appears to us on record; and have there this writ. Witness, &c.

Writ

*Writ of possession upon a judgment in
 judgment in the Common Pleas, re-
 moved into the court of King's Bench,
 by writ of error, and there affirmed.*

GEORGE the third, by the grace of
 God, of Great Britain, France, and
 Ireland, King, defender of the faith, &c.
 To the Sheriff of Middlesex, greeting:
 Whereas Richard Williamson hath lately in
 our Court, before Sir Charles Pratt knight,
 and his brethren, our justices of our court
 of Common Pleas, by our writ, and by the
 judgment of the same court, recovered
 against William Norton late of London, yea-
 man, his term yet unexpired, of and in
 eight messuages, with the appurtenances,
 in the parishes of Saint Martin in the Fields,
 and Saint Clement Dunes, in your county,
 which Christopher Grassford gentleman, on
 the first day of May in the third year of
 our reign, demised to the said Richard;
 to have and to hold to him and his assigns,
 from the twenty-fifth day of December then
 last past, to the full end and term of seven
 years, from thence next ensuing, and
 fully to be compleat and ended. And
 whereupon the said William, afterwards,
 that is to say, on the twenty-first day of
 January,

January, in the third year aforesaid, with force and arms, entered into the tenements aforesaid, with the appurtenances, and expelled and removed the said *R.* from his possession thereof, and ejected him from his said farm therein; whereof the said *William* is convicted, as by the inspection of the said record and proceedings thereof, which we lately caused to be brought into our court before us, by virtue of our writ for correcting errors prosecuted by the said *William*, of and upon the said premises, now remaining in our court before us, it appeareth to us on record; whereupon the said judgment is before us affirmed, as it likewise appeareth to us on record: and therefore we command you, that without delay, you cause the said *Richard* to have his possession of his term aforesaid, yet unexpired, of and in the tenements aforesaid; and in what manner you shall execute this our writ, do you make appear to us on the octave of the purification of the blessed virgin *Mary*, wheresoever we shall then be in *England*; and have there this our writ. Witness *William* earl *Mansfield*, at *Westminster*, on the twenty-eighth day of *November*, in the fifth year of our reign.

Judgement

*Tarde returned upon the writ of possession,
and the writ of inquiry executed, and
another writ of possession awarded.*

AT which day comes here the said L. by his attorney aforesaid, and the sheriff (that is to say) R. S. knight, now returns, that as to the aforesaid writ to cause the said L. to have possession, &c. the same writ was delivered so late to the said sheriff, that for the shortness of the time, he could not proceed to the execution thereof; and as to the said writ of inquiry of damages, &c. the said sheriff doth return here a certain inquisition taken at E. in the county aforesaid, on the eleventh day of *November* last past, by the oath of twelve, &c. whereby it is found that the said L. hath sustained damages, by occasion of the trespass and ejectment aforesaid, besides his costs, &c. to forty shillings, and for those costs, &c. to six pence. Therefore it is adjudged that the said L. do recover against the said T. his damages aforesaid to forty shillings, found by the said inquisition in the manner aforesaid; and also six pounds nineteen shillings and six pence, adjudged to the said L. at his request, &c. which damages in the

X whole

whole amount to eight pounds. And be the said *T.* taken, &c. and hereupon the said *L.* as before, prays the writ of our love-reign lord the king, to be directed to the sheriff of the county aforesaid, to cause the said *L.* to have possession, &c.

As to the writ of possession, the sheriff returneth that nothing was done thereupon; and as to the writ of inquiry for damages, the same executed, and another writ of possession awarded.

AT which day comes here the said *T. P.* by his attorney aforesaid. And as to the said writ, to cause the said *T.* to have possession, &c. the sheriff did nothing thereupon, nor returned the writ. Therefore as before, let another writ be thereof made, directed to him in the manner aforesaid, &c. returnable here on the octave of saint *Hilary*, &c. And as to the aforesaid writ to enquire of the damages, &c. the sheriff, that is to say, *A. B.* doth now return here a certain inquisition, [as in other cases] and for those costs and charges to six shillings; and because the justices will advise themselves, of and upon the premises; until the octave of saint *Hilary*, before they give their judgment, &c.

which

which day cometh here the said T. by his attorney aforesaid, and hereupon the premises being seen, and by the said justices here fully understood, it is adjudged, &c. (as in the former.) And as to the said writ to cause the said T. to have possession, &c. the sheriff, on the said octave of saint Hillary, had done nothing thereupon, nor returned his writ; therefore (as before) let another writ thereof be made in the manner aforesaid, returnable here, &c.—

The sheriff returneth that he hath delivered possession, and an inquisition for the damages, and the court will advise, before they pronounce judgment for the damages.

AT which day here cometh the said plaintiff, by his attorney aforesaid, and as to the writ to cause the said plaintiff to have possession, &c. the sheriff, that is to say, G. S. esquire, now returns, that he by virtue of the writ aforesaid to him directed, did, on the twenty-first day of November last past, cause the said plaintiff to have his possession of his term aforesaid yet unexpired, of and in the tenements aforesaid, with the appurtenances, accord-

which

X 2

ing

ing to the purport of the writ aforesaid; and as to the said writ to enquire of the damages, &c. the said sheriff doth also return here a certain inquisition (as in other cases, until) for those costs and charges to four pence; and because the justices here will advise, of and upon the premises, as to that particular whereof the said writ of enquiry of damages did issue, before they pronounce their judgment thereupon, a day is given to the said plaintiff, as in other cases.

The sheriff returneth, that possession was delivered by his predecessor, and a tarde as to the writ of inquiry.

AT which day here cometh the said *W.* by his attorney aforesaid, and the sheriff, to wit, *W. G.* esquire, now returns here, that *W. B.* esquire, late sheriff of the county aforesaid, predecessor to the said now sheriff, as to the said writ to cause the said *W.* to have possession, &c. did, by virtue of the said writ to him directed, on the eighth day of *March* last past, cause the said *W. H.* to have his possession, of and in the tenements and passage aforesaid, with the appurtenances, yet unexpired; and as to the writ of enquiry of damages,

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damages, &c. that writ was so late delivered to him, that for the shortness of time he could not execute the same; which said writ, was by the said late sheriff, on his going out of his office, delivered to the said now sheriff, together with the return of the same, executed as aforesaid, &c.

Assignment of errors in the King's Bench, in a judgment of ejectment in the Com- mon Pleas.

Afterwards, that is to say, on *Wednesday* next after five weeks from the feast day of *Easter* in this said term, the said *James Chapman Fuller*, by *Joseph Sherwood*, his attorney, appears before our sovereign lord the king, at *Westminster*, and pleads that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this respect; that is to say, that it appears by the record aforesaid, that the said judgment given in the manner aforesaid, was given for the said *R. H.* against the said *I. C. F.* whereas by the law of this kingdom of *Great Britain*, the said judgment ought to have been given for the said *I. C. F.* against the said *R.* and therefore it is manifestly erroneous in this respect; and the said *I. C. F.* prays a writ

Prayer of
sci. fa. ad
audiendum
errores.

Sci. fa. ac-
cordingly.

Vic. non mis-
breve.

of our sovereign lord the king, to summon the said *R.* to be before our said sovereign lord the king, to hear the record and proceedings aforesaid; and it is granted to him, &c. By which the sheriff is commanded that by honest, &c. he make known to the said *Robert*, that he be before our said sovereign lord the king, on the morrow of the holy *Trinity*, wheresoever, &c. to hear the record and proceedings aforesaid; and further, &c. The same day is given to the said *I. C. F.* &c. At which day the said *I. C. F.* by his attorney aforesaid, appears before our sovereign lord the king, &c. and the sheriff returned not the writ thereupon. And the said *R.* at the same day, by *Nathan Hickman*, his attorney, likewise comes here into this court, *gratis*; whereupon the said *I. C. F.* pleads, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, alledging the error aforesaid by him before alledged in the manner aforesaid; and prays that the judgment aforesaid, for that and other errors in the record and proceedings aforesaid, may be reversed annulled and rendered altogether ineffectual, and that he may be restored to all things which he hath been deprived of, by reason of the judgment aforesaid;

APPENDIX.

aforsaid; and that the said *Robert* may join to the errors aforsaid; and that the court of our said sovereign lord the king, may now here proceed to an examination, as well of the record and proceedings aforsaid, as of the matters above assigned for error as aforsaid. And thereupon the said *Robert* doth aver, that neither in the record and proceedings aforsaid, nor in giving the judgment aforsaid, is there any error whatsoever; and he likewise prays, that the court of our said sovereign lord the king, may now here proceed to an examination, as well of the record and proceedings aforsaid, as also of the matters aforsaid above assigned for error as aforsaid; and that the said judgment may be in all things affirmed, &c.—

Joinder in error.

Entry of an assignment of errors in the Exchequer Chamber, and of the judgment thereon; as also of the remission of the record back again into the court of King's Bench.

Afterwards, that is to say, on Saturday the fifteenth day of January, in the nineteenth year of the reign of our sovereign lord the king, that now is, the

transcript of the record and proceedings
aforesaid, between the said parties, toge-
ther with all things touching the same, by
means of a writ of our sovereign lord the
king, for correcting errors in the premises,
sued out by the said *Francis Gerrard*, were
transmitted to the justices of the *Common
Bench* of our said sovereign lord the king,
and the barons of the *Exchequer* of our said
sovereign lord the king, into the *Exchequer
Chamber* aforesaid, (according to the form
of the statute made, in the parliament of
our late sovereign lady *Elizabeth* late queen
of *England*, at *Westminster*, on the twenty-
third day of *November*, in the twenty-seventh
year of her reign;) from the said court of
our said sovereign lord the king, before
the king himself. And the said *Francis*,
in the same exchequer chamber, assigned
divers matters in the record and proceedings
aforesaid, for reversing and annulling the
said judgment: To which the said *Gideon*
appearing in the same court, pleaded that
there is no error whatsoever, either in the
record and proceedings aforesaid, or in
giving the judgment aforesaid. And after-
wards, that is to say, on *Saturday* the sixth
day of *February*, in the twenty-first year of
the reign of our sovereign lord the king
that now is, as well the said *Gideon Cook*

as also the said *Francis Gerrard*, by their attornies aforesaid, came before the said justices of the *Common Bench* of our said sovereign lord the king, and the barons of the *Exchequer* of our said sovereign lord the king, in the said court of the *Exchequer Chamber* aforesaid. Whereupon all and singular the premises being viewed, diligently examined, and fully understood, by the court of our said sovereign lord the king, in the said *Exchequer Chamber*; on mature deliberation had thereon, it was adjudged, that the judgment aforesaid is in no wise vicious or defective, and that there is no error in the record or proceedings aforesaid. Therefore it was adjudged, that the said judgment should be in all things affirmed, and remain in its full force and effect, the said cause above assigned for error to the contrary in any wise notwithstanding. And it was then and there further adjudged, that the said *Gideon Cook* should recover against the said *Francis Gerrard*, — pounds, awarded by the court of our said sovereign lord the king, in the court of the *Exchequer Chamber* as aforesaid, to the said *Gideon*, with his consent, according to the form of the statute in such case made and provided, for his damages and costs, which he sustained by reason of delaying

laying the execution of the judgment aforesaid, by means of suing out and prosecuting the said writ of error. And thereupon the record aforesaid, and also the proceedings in the premises, had thereupon, before the justices and barons aforesaid, were remitted before our said Sovereign lord the king, wheresoever, &c. by the justices and barons aforesaid, according to the form of the statute, &c. and they now remain here in the said court of our said sovereign lord the king.

Coote v. Lynch.

Writ of error upon a bill of exceptions, on a verdict, and judgment in the Common Pleas in Ireland, removed into the King's Bench there, and affirmed; and from thence removed to the King's Bench in England, and there affirmed; and afterwards removed into the House of Lords.

WILLIAM the third, by the grace of God, &c. To our trusty and well-beloved counsellor, sir *Richard Pyne* knight, our chief justice, assigned to hold pleas before us, in our kingdom of *Ireland*, greeting: because in the record and proceedings, and also in giving judgment, of a plaint, which was levied in our court of *Common Pleas* in our kingdom of *Ireland*, before you and your brethren, then our justices of the same court, by our writ, between *John Lynch* gentleman and *Richard Cooke* esquire, of a plea of trespass and ejectment, done to the said *John* by him the said *Richard*: which said record and proceedings, with the cause of the intervening error, we have caused to be brought

brought before us in our kingdom of *Ireland*, and the judgment thereupon is affirmed before us in our kingdom of *Ireland*, and now remaining before us in our said kingdom of *Ireland*; manifest error intervened to the great damage of the said *Richard*, as we have received information from his complaint: we, willing the error, if any, be in a due manner corrected, and full and speedy justice done to the said parties in this particular, command you, that if judgment be thereupon given, and affirmed, then do you certify under your seal, the record and proceedings aforesaid, distinctly and plainly, together with all things relating thereto, and this writ, so that we may have them on the octave of the purification of the blessed virgin *Mary*, wherever we shall then be in *England*; that by inspecting the record and proceedings aforesaid, we may cause further to be done therein, what of right ought to be done, for correcting the error therein: and do you make known to the said *John*, that he be there then to proceed in the plaint aforesaid; and further to do and receive that which our court shall adjudge in the premisses. Witness ourself at *Westminster*, on the eighteenth day of *December*, in the seventh year of our reign.

Layton.

Allowed, *Richard Pyne.*

The

Lil. entr.
271.
Carth. 460.
5 Mod. 421.
Salk. 321.
S. C.

Return of the
writ of error.

The record and proceedings of the plaint, whereof mentioned is within made, with all things touching the same, I certify to our sovereign lord the king, wheresoever, &c. at the day and place within contained, in the record to this writ annexed; and I have made known to the within named *John Lynch*, that he be then there, to proceed in the plaint aforesaid, as I am commanded to do.

The answer of *Richard Pyne*.
Pleas before our sovereign lord the king, at the king's court, of Trinity Term, in the seventh year of the reign of our sovereign lord William the third, king of England, Scotland, France and Ireland, defender of the faith. Witness sir Richard Pyne, knight.

Savage.

Writ of error
to the Chief
Justice of K.
B. in Ireland,
to examine
the record
and proceed-
ings there.

“OUR sovereign lord the king hath
“sent to his trusty and well-belov-
“ed counsellor, sir *Richard Pyne* knight,
“his writ close in these words, that is to
“say: *William* the third, by the grace of
“God, &c. To our trusty, and beloved
“counsellor, sir *Richard Pyne* knight, greet-
“ing: Because in the record and proceed-
“ings, and also in giving judgment, in a
“plaint,

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"plaint, which was before you and your
 "brethren, our justices of the Common
 "Bench of the kingdom of Ireland, by our
 "writ between *John Lynch* plaintiff, and
 "*Richard Coote* esquire defendant, in a plea
 "of trespass and ejectment, manifest error
 "intervened, as it is said, to the great da-
 "mage of the said *Richard*, as we have re-
 "ceived information from his complaint.
 "We willing the error, if any there is,
 "be in a due manner corrected, and full
 "and speedy justice done to the parties
 "aforesaid, in this particular, command
 "you, that if judgment hath been there-
 "upon given, then send you under your
 "seal, distinctly and plainly, the record and
 "proceedings aforesaid, together with all
 "things touching the same, and this writ,
 "so that we may have them before us, on
 "the octave of the purification of the blessed
 "virgin *Mary*, wheresoever we shall then
 "be in *Ireland*; that inspecting the record
 "and proceedings aforesaid, we may cause
 "further to be done, for correcting the
 "errors therein, what of right, and accord-
 "ing to the customs of our kingdom of
 "*Ireland* ought to be done. Witness our
 "trusty and well beloved counsellor, *Henry*
 "lord baron *Capel* of *Tewkesbury*, sir *Cyrill*
 "*Wych* knight, and *William Duncomb* esq.

" our justices and general governours of our
 " kingdom of *Ireland*, at the King's Court,
 " on the first day of *February*, in the seventh
 " year of our reign.

Carr and Carr.

Return of the
 writ of error:

By virtue of this writ, to me directed, I
 humbly certify to our sovereign lord the
 king, the record and proceedings of the
 plaint, whereof mention is within made,
 together with all things touching the same,
 as this writ doth direct and require.

Richard Pyne.

Pleas at the king's courts, before sir
Richard Pyne knight, and his bre-
thren, justices of our sovereign lord
and lady William and Mary, king and
queen of England, Scotland, France,
and Ireland, defenders of the faith,
of their bench, of the kingdom of Ire-
land, of Hilary term, in the fifth
year of their reign.

Walker.

Declaration
 in ejectment
 in the Com-
 mon Pleas in
 Ireland, of a
 castle, ma-
 nor, &c.

Richard Coote esquire, was attached to
 answer to John Lynch gentleman, of a
 plea wherefore, with force and arms, he
 broke and entered into the castle, manor,
 and vill, of Gormanstowne; and two hundred
 messuages,

messuages, two hundred cottages, two hundred gardens, one hundred orchards, three windmills, three fulling-mills, one thousand acres of land, one thousand acres of meadow, one thousand acres of pasture, and one thousand acres of furze and heath, with the appurtenances, in the vills and land of *Gormanstowne*, *Carrowstowne*, *Richardstowne*, *Boltray*, *Leogdeory*, *Balloy*, *Stamulm*, and *Caddellstowne*; and all and singular which premises lie in the barony of *Duleeke* and county aforesaid, which *Jenico Preston* gentleman, commonly called *Jenico viscount Gormanstowne*, demised to the said plaintiff, *John Lynch*, for a term which is not yet past, and ejected the said *John Lynch* from his farm aforesaid, his term aforesaid therein being not yet expired; and did him other wrongs, to the great damage, &c. and against the peace, &c. and whereupon the said *John Lynch*, by *Michael Hall* his attorney, complains, that whereas the said *Jenico Preston* on the first day of *May*, in the year of our Lord 1693, at *Gormanstowne* in the county aforesaid, demised and to farm let to the said *John Lynch*, the castle, manor, and vill, of *Gormanstowne*; and two hundred messuages two hundred cottages, two hundred gardens, one hundred orchards, three windmills, three fulling-mills, one thousand acres

Return of the
Writ of Error

Declaration
in ejectment
in the Court
of Common
Pleas in
Ireland, of a
castle, manor,
and vill, of

acres of land, one thousand acres of meadow, one thousand acres of pasture, and one thousand acres of furze and heath, with the appurtenances, in the vills and land of *Germanstowne, Carrowstone, Richardstowne, Baltray, Leogdeory, Balloy, Stamulni, and Caddellstowne*; all and singular which premisses lye in the barony of *Duleeke* and county aforesaid, to have and to hold all and singular the demised premisses, to the said *John Lynch* his executors administrators and assigns, for the term of twenty-one years; thence next following; by virtue of which said demise, the said *John Lynch* on the second day of the month of *May* aforesaid, in the year of our Lord 1693, entered into the said demised premisses, with the appurtenances, and was possessed thereof: and being so possessed thereof, he the said *R. C.* on the third day of *May*, in the year aforesaid, with force and arms, entered into the said demised premisses, in and upon the possession thereof of the said *John Lynch*, and with force and arms, ejected expelled and removed the said *John* from his farm aforesaid, (his term aforesaid therein being unexpired) and did and now doth withhold the said *John* from his farm aforesaid, being so expelled therefrom; and then and there did him

him other injuries, against the peace of our sovereign lord and lady, the now king and queen, and to the great damage of the said *John*; whereupon he declares he is injured and endamaged to the value of four thousand pounds sterling, and therefore he brings his suit, &c. And the the said R. by R. P. his attorney comes and defends the force and injury, when &c. and saith that he is in no wise guilty of the premises above charged upon him, in such manner and form as the said *John* complains against him; and thereof he puts himself upon the country, and the said *John* doth likewise the same; therefore the sheriff is commanded, that he cause to come here in fifteen days from *Easter* day, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties to be here, &c. Afterwards, the process being thereupon continued between the parties aforesaid, the jury are thereupon respited in the said action here, unto this day, (that is to say) in fifteen days from the day of *St. Hilary*, then next following; before which day our said sovereign lady *Mary*, late queen of *England*, departed this life; after whose decease (that is to say) in fifteen days of *St. Hilary*, as well the said *I. L.* gentleman as the said

Not guilty.

Jurata.

Demise of the queen.

Y

R. C.

Verdict at
bar for the
plaintiff.

Judgment.

R. C. esq; by their attornies aforesaid, appear; and the jury thereupon impannelled, being called, likewise appear, who being elected, tried, and sworn to declare the truth of the premisses, do upon their oath declare, that the said *R. C.* is guilty of the trespass and ejectment aforesaid in such manner and form, as the said *V. L.* declares against him; and they do assess the damages of the said *John*, occasioned by the trespass and ejectment aforesaid, besides his expences and costs, laid out by him about his suit in this cause, to twelve pence sterling, and for those expences and costs to six pence. Therefore it is adjudged, that the said *I. L.* gentleman, do recover against the said *R. C.* his term aforesaid, yet to come, of and in the said premisses, with the appurtenances, and his damages aforesaid, assessed by the said jury to eighteen pence, in the manner aforesaid; and also thirty-six pounds six shillings and nine pence, adjudged by this court to the said *I. L.* with his consent for his expences and costs aforesaid, by way of increase: which said damages in the whole amount to thirty-six pounds eight shillings and three pence; and be the said *R. C.* &c. taken, &c.

Examined by *Walton*.

After-

Afterwards (that is to say) on *Friday* next. *Scire facias*
 after the morrow of the *Holy Trinity*, *Quare execu-*
 in this same term, the said *I. L.* by *Charles*
Redman his attorney, appears before our
 sovereign lord the king, at the king's
 court; and the said *John* prays a writ of
 our sovereign lord the king, to summon the
 said *R. C.* to be before our said sovereign
 lord the king, to shew if he hath or knows
 of any thing to say for himself, why the
 said *I. L.* ought not to have his execution
 against him, of and upon the judgment
 aforesaid; and it is granted to him, &c. by
 which the sheriff of the county aforesaid is
 commanded, that by honest men, &c. he
 make known to the said *R. C.* that he be
 before our sovereign lord the king, on *Tues-*
day next after the morrow of the *Holy Trinity*,
 wheresoever, &c. to shew cause in the man-
 ner aforesaid, if, &c. and further, &c. the
 same day is given to the said *John* to be there,
 &c. at which day the said *I. L.* appears be-
 fore our sovereign lord the king, at the
King's Court, by his attorney aforesaid, and
 offers himself on the fourth day of the plea,
 against the said *R. C.* in the said action;
 and he, being solemnly called, appears not,
 and the sheriff doth now return here, that
 the said *R. C.* hath nothing, &c. nor is he

Return of
nihil.

*Alias scire
facias.*

Bill of excep-
tions.
Pract reg.
232.
13 Ed. 1,
c. 31.
Bull. *nisi*
pri. 315, &c.

Recital of the
record.

to be found, &c. therefore the sheriff of the said county is as before commanded, that by honest men, &c. he make it known to the said R. C. that he be before our said sovereign lord the king, at the *King's Court*, on *Wednesday* next after the morrow of *All-Souls*, wheresoever, &c. to shew cause in the manner aforesaid, if, &c. the same day is given to the said I. L. &c. at which day as well the said I. L. by his said attorney, as also the said R. C. by L. M. his said attorney, appear before our sovereign lord the king at the *King's Court*, and thereupon the said R. C. brings here into this court of our said sovereign lord the king, before the king himself, a bill of exceptions, with the seal of sir *Richard Pyne* knight, second justice of our said sovereign lord the king, of his *Common Bench*, of his kingdom of *Ireland*, and sir *John Jefferson* knight, one of the justices of the same court, at the request of the said R. C. thereto affixed, according to the form of the statute in such case made and provided, as it is affirmed, desiring it to be here enrolled, and it is granted, &c. which said bill follows in these words, that is to say; Be it remembred, that *John Lynch*, gentleman, before sir *Richard Pyne* knight, and his brethren, justices of our sovereign lord the king, of his bench in the kingdom of

of Ireland, at the King's Courts at Dublin, prosecuted a plea of trespass and ejectment against *Richard Coote* esquire, by a writ of our said sovereign lord the king and the late queen, suggesting by his declaration, upon his writ aforesaid, that *Jenico Preston* gentleman, commonly called *Jenico* lord viscount *Gormanstowne*, on the first day of *May*, in the year of our Lord 1692, at *Gormanstowne* in the county of, &c. had demised and to farm let, unto the said *I. L.* the castle, manor, and vills of *Gormanstowne*, (so reciting the declaration, as is before mentioned,) to which said declaration, the said *R. C.* by *R. P.* his attorney, came into the same court, before the said justices, and defended the force and injury when, &c. and pleaded that he the said *R. C.* was not guilty of the trespass and ejectment aforesaid, and thereof he put himself upon the county; and the said *I. L.* did likewise the same. And now here at the trial of the issue aforesaid, between the parties aforesaid, *R. R.* esquire, of counsel with the said plaintiff, to maintain the issue aforesaid, on the part of the said plaintiff, and to prove the title of the said *Jenico Preston*, the lessor of the plaintiff to the demised premises aforesaid, at the time of the demise, made as aforesaid, gave in evidence to the said jurors, an act of our late

The plaintiff's evidence.

late sovereign lord *Charles* the second, king of *England*, of the parliament of his kingdom of *Ireland*, in a parliament of our said sovereign lord king *Charles* the second, begun at *Dublin*, in his said kingdom of *Ireland*, on the eighth day of *May*, in the thirteenth year of the reign of our said late sovereign lord king *Charles* the second, and there continued by several prorogations, until the twenty-sixth day of *October*, in the seventeenth year of the reign of the same king; intituled, An Act, &c. By which said act of parliament, it is enacted, that, &c. he also gave in evidence, that the said *Jenico* viscount *Gormanstowne*, after making the said indenture, that is to say, on the eighteenth day of *October*, in the year of our Lord 1690, died, without issue male begotten of his body, and that the said *Jenico*, the lessor of the now plaintiff, and *Jenico Preston*, the eldest son of *Nicholas Preston* brother of *Jenico Preston* late viscount *Gormanstowne*, mentioned in the indenture of lease aforesaid, is one and the same and not different persons, and that the said *Jenico Preston*, the lessor of the now plaintiff, demised the premises aforesaid to the said *John Lynch*, in such manner and form as is expressed in the declaration aforesaid; and that the said *John Lynch*, by virtue of the demise aforesaid, entered

tered and was thereof possessed, until the said *Richard Coote* ejected him, in such manner and form as the said *John Lynch* above complains against him.

¶ *Nebemiah Donnelland* esquire, prime serjeant at law of our sovereign lord the king, offered to prove and give in evidence to the said jurors, on the part of the said *R. C.* that the said *Jenico* had no seisin interest or title, in or to the said vills, lands, and tenements and that he could not recover the possession mentioned in the declaration aforesaid, in such manner and form as the said *Jenico* proposed by his said suit; and that the said *Richard* was not guilty of the trespass and ejectment aforesaid; and that all and singular the vills, lands, and tenements aforesaid, mentioned in the declaration, were seised and sequestred into the hands, and to the use, of *Charles* the first late king of *England*, after the twenty-third day of *October*, in the year of our Lord 1641. And the said *N. Donnelland*, on the part of the said defendant, produced and gave in evidence to the said jurors, that it is further provided by the said act, That, &c. And the said *N. Donnelland* further offered and would have proved in evidence, to the said jurors, that the lands tenements and premisses, mentioned in the declaration aforesaid, were in

The defend-
ant's evi-
dence.

the seisin of the said R. C. at the time of making the said act, as assignee of the said earl of *Mountrab*, being the son of the said earl, and the lands aforesaid being duly assigned and limited, to him and his heirs, according to the true intent of the said act; and that the said lands in the declaration, were the lands of the said viscount *Gormanstowne*, and by the said clause or provision to be restored to him, after a reprisal made to the said *Richard*; and that the said lands and tenements do, and at the time of making the said act of explanation did, contain one thousand four hundred acres of land; and that no other forfeited lands were assigned to the said *Richard*, as assignee to the said earl, or to any other person, the heirs or assigns of the said earl, in satisfaction thereof, except lands containing one thousand and one hundred acres, and no more; and that no satisfaction was made, for the rents and profits of the said lands, received by the said lord viscount *Gormanstowne*, named in the said act, or by his agents, after the entry upon the premises, made by him as aforesaid; and for these reasons, and until the full number of one thousand four hundred acres be assigned to the said *Richard*, in satisfaction of the said one thousand four hundred acres, mentioned

tioned in the said declaration, and until satisfaction be made to him for the rents and profits of the premises aforesaid, according to the true intention of the said act, the said viscount, or his assigns, ought not to be restored to the tenements aforesaid, mentioned in the declaration aforesaid. And the said *N. Donnelland* further shewed and gave in evidence, to the said jurors, that the said *Jenico*, late viscount *Gormanstowne*, was restored by the said act, but was attainted of high treason, committed against our sovereign lord the king, that now is, and our late sovereign lady the queen, that is to say, on the tenth day of *April*, in the third year of their reign; by virtue whereof, all his lands and tenements were forfeited to the said king and queen, without any office or inquisition to be found thereof, according to the form of the statute in such case made and provided; and by reason thereof were seised into the hands of our said sovereign lord the king, that now is, and of our sovereign lady, the late queen; whereby the said *Jenico*, mentioned in the said declaration, could obtain no possession or seisin by his entry, because the hands of our said sovereign lord the king, that now is, and our said sovereign lady the queen, were not from thence removed;

The evidence
in dispute.

Reference to
the judges.

removed; so that, for that reason, the demise of the premises aforesaid, supposed to be made to the said *John Lynch*, was invalid and of no effect; and he further shewed and gave in evidence, to the said jurors, that an instrument, produced in writing on the part of the plaintiff, importing an inrollment, in the exchequer, of an order made by the said commissioners for the execution of the said act of parliament, to wit, an order bearing date on the first day of *January*, in the year of our Lord 1668, shewn in evidence to the said jurors, by *Robert Rochford* esquire, of counsel for the plaintiff, ought not to have been given in evidence to the said jurors, without proof, upon the oath of witnesses, that the said order was signed and sealed by the said commissioners; because it was not of record, nor was any order of itself a record: and he the said *N. D.* desired the said justices before whom the trial was of the issue aforesaid, to inform the said jurors, and declare to them the law, of and concerning the premises; and that the demise aforesaid, made to the plaintiff, was invalid, for the reason aforesaid; and that the said *Jenico Preston* ought not to be restored to the premises, for the impediment and reasons aforesaid, which, according to the form

apd

and effect of the said statute, ought to be removed before he should be restored: but the said justices affirmed, to the said jurors, that the matter shewn by the said *N. D.* in manner and form aforesaid, was of no effect to preclude the said *Yenico*, or the said plaintiff, from having or maintaining the said action; whereupon the said *N. D.* in as much as the matter aforesaid shewn by him, and produced and given in evidence to the said jurors, would in no wise appear by the verdict of the said jurors, requested the said justices, according to the form of the statute in such case made and provided, to seal this present bill of exceptions, which contains in itself the matters aforesaid, shewn by the said *N.* in evidence to the said jurors, in the manner and form aforesaid; which said justices, at the request of the said *N.* according to the form of the statute in such case made and provided, sealed this present bill, at the king's court aforesaid, on the fourth day of *February*, in the year of our Lord 1694.

R. Cox, J. Jefferson. And the said *Richard Coote* prays a writ of our sovereign lord the king, to summon the said sir *Richard Cox* knight, and sir *Jahn Jefferson* knight, the justices aforesaid, that they be before our said sovereign lord the king, wheresoever, &c.

and

Their determination.

Prayer of a bill of exceptions.

Scire facias to the justices to acknowledge or deny their seals.

The justices
appear, and
acknowledge
their seals.

Writ of error
to the King's
Bench in Ire-
land.

and it is granted to them, &c. by which the said justices are commanded, that they be before our sovereign lord the king, on *Saturday* next after the morrow of *saint Martin*, wheresoever, &c. to deny or acknowledge the bill of exceptions, asserted to have been sealed by them as aforesaid, according to the form and effect of the statute, &c. At which day the said *Richard Cox* and *John Jefferson* personally appear, before our said sovereign lord the king, at the king's court, and acknowledge the seals, asserted to have been put to the said bill of exceptions, to be the seals of the said *Richard Cox* and *John Jefferson*. And thereupon the said *Richard Coote* brings into this court of our said sovereign lord the king, before the king himself, another writ of error, in the premises, directed to *sir Richard Reynell* knight and baronet, chief justice of our said sovereign lord the king, in these words, that is to say, *William* the third, by the grace of God, &c. To our trusty and well-beloved counsellor, *sir Richard Reynell* knight and baronet, our chief justice assigned to hold pleas before us in our kingdom of *Ireland*, and his brethren our justices there, greeting: Forasmuch as in the record and proceedings, on a plaint which was levied in the court

of *Common Bench* of us and of the lady *Mary* our late queen, before our trusty and beloved counsellor, sir *Richard Pyne* knight, our chief justice of the same *Bench*; and also in giving judgment on the same plaint, which was given in our court of *Common Bench*, between *John Lynch* gentleman plaintiff, and *Richard Coote* esquire defendant, of a plea of trespass and ejectment, manifest error intervened, as it is alledged, to the great damage of the said *Richard*, as we have received information from his complaint; we command you, that you, inspecting the record and proceedings aforesaid, cause further to be done for correcting the errors therein, what of right, and according to the law and customs of our kingdom of *Ireland*, ought to be done. Witness our faithful and well-beloved counsellor, *Henry* lord baron *Capell* of *Tewksbury*, deputed our general governor of our kingdom of *Ireland*, at the king's court, on the thirty-first day of *May*, in the seventh year of our reign.

Carr and *Carr*, by *Carr*.

Allowed, *R. Reynall*.

And thereupon the said *Richard Coote*, by his attorney aforesaid, comes and pleads, that in the record and proceedings aforesaid,
and

Assignment
of errors in
Ireland.

and also in giving judgment as aforesaid, there is manifest error in this respect, that is to say, that by the record and proceedings aforesaid it doth appear, that the judgment, given in the plea aforesaid, was given for the said *John Lynch* against the said *Richard Coote*, whereas by the law of the land of this kingdom of *Ireland*, judgment ought to have been given for the said *Richard Coote* against the said *John Lynch*, by reason of which, and other errors being in the record and proceedings aforesaid, he the said *Richard Coote*, prays that the said judgment be reversed, annulled, and rendered ineffectual, &c. And that he may be restored to all things, which he hath been deprived of by reason of the judgment aforesaid. At which *Saturday* after the morrow of *saint Martin*, as well the said *Richard* as the said *John*, by their attornies aforesaid, appear before our said sovereign lord the king, whereupon the said *Richard* as before avers, that in the record and proceedings aforesaid, and also in giving judgment as aforesaid, manifest error intervened, alledging the error aforesaid above assigned by the said *Richard* in manner aforesaid, and prays that the judgment aforesaid, for that and other errors being in the record and proceedings aforesaid,

said,

said, may be reversed annulled and rendered altogether ineffectual; and that he may be restored to all things which he hath been deprived of by reason of the judgment aforesaid; and that the said *John* rejoin to the errors aforesaid; and that the court of our said sovereign lord the king may now here proceed to an examination, as well of the record and proceedings aforesaid, as of the said matter above assigned for error. And the said *John Lynch* avers, that neither in the record and proceedings aforesaid, nor in giving judgment as aforesaid, is there any error whatsoever; and he likewise prays, that the court of our said sovereign lord the king may proceed to an examination, as well of the record and proceedings aforesaid, as of the said matter above assigned for error; and that the judgment aforesaid may be in all respects affirmed: and because the court of our said sovereign lord the king is not yet advised, what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, to be before our said sovereign lord the king, till the octave of saint *Hilary*, wheresoever he shall then be in *Ireland*, to hear their judgment of and upon the premises, for that the court of our said sovereign lord the king are not yet advised thereof,

Joinder in error.

Judgment
affirmed.

thereof, &c. At which day the said parties, by their said attornies, came before our said sovereign lord the king, at the king's court, whereupon, the premises being viewed, and by the court of our said sovereign lord the king fully understood, and upon diligent examination as well of the record and proceedings aforesaid, and the judgment thereupon, as also of the said causes above assigned for error by the said *Richard Coote*, and upon mature deliberation thereupon had, it appears to the court of our said sovereign lord the king, that there is no error in the record; therefore it is adjudged, that the said judgment be in all respects affirmed, and that it remain in full force and effect, the said cause and matters, above assigned for error, in any wise notwithstanding. And it is further adjudged, that he the said *J. L.* do recover against the said *R. C.* eighteen pounds sixteen shillings sterling, for his damages and costs, which he has sustained by reason of delaying the execution of the judgment aforesaid, by means of prosecuting the said writ of error in the premises; and that the said *J. L.* have his execution thereof, &c.

Assignment
of errors in
England.

Afterwards, that is to say, on *Friday* next after the morrow of saint *Martin*, in this same term, the said *R. C.* appears before
our

our said sovereign lord the king at *Westminster*, by *John Lilly* his attorney, and declares that in the record and proceedings aforesaid, and also in giving judgment aforesaid,—and moreover in the affirmance thereof there is manifest error in this respect, that is to say; that by the record of the judgment aforesaid, and the affirmance thereof, it doth appear, that the judgment aforesaid was given, and affirmed, in the manner aforesaid, for the said *John Lynch* against the said *Richard Coote*, whereas by the law of the land of the said kingdom of *Ireland*, judgment ought to have been given for the said *Richard Coote* against the said *John*; therefore it is manifestly erroneous in that respect: and this the said *Richard* is ready to verify, wherefore he prays that the said judgment, and the affirmance thereof, for those and other errors being in the record and proceedings aforesaid, be reversed, annulled, and rendered altogether ineffectual; and that he the said *R. C.* be restored to all things, which he hath been deprived of, by reason of the judgment aforesaid, and the affirmance thereof; and that the said *John* may rejoin to those errors. And the said *John*, by *Jonathan Bolt* his attorney, comes gratis here into this court, and having awarded the errors

Joinder in
error.

errors aforesaid, he forthwith pleads, that neither in the record and proceedings aforesaid, or in giving the judgment aforesaid, or in the affirmance thereof, is there any error whatsoever, and prays that the court of our said sovereign lord the king may proceed to an examination, as well of the record and proceedings aforesaid, as also of the matter above assigned for error; and that the said judgment be in all things affirmed; and because the court, &c.

Writ of error
in parlia-
ment.

WILLIAM the third, by the grace of God, &c. To our trusty and beloved sir *John Holt* knight, our chief justice assigned to hold pleas before us, greeting: Because in the record and proceedings of a certain plaint, which was levied in our and our late queen *Mary's* court of *Common Bench* of the kingdom of *Ireland*, before sir *Richard Pyne* knight, and his brethren, our and our said late queen's chief justice of the same court, by our writ, and also in giving judgment of the said plaint, which was given in our court of *Common Bench* aforesaid, between *John Lynch* gentleman, and *Richard Coote*, esquire, in a plea of trespass and ejectment, done to the said *John* by the said *Richard*; which said record and proceedings, with the causes

of error, we caused to be brought before us in our said kingdom of *Ireland*, and the judgment was thereupon affirmed in our kingdom of *Ireland*; and we thereupon caused the said record and proceedings, with the cause of the error intervening therein, to be brought before us in *England*, and the judgment is thereupon affirmed before us in *England*; manifest error intervened, as it is said, to the great damage of the said *Richard*, as we have received information from his complaint. We, willing that the error, if any there is, be duly corrected, and full and speedy justice done to the parties aforesaid, command you, that if the judgment in the *Common Pleas* of our kingdom of *Ireland*, and in our court before us in *England*, be affirmed, then do you without delay, plainly and distinctly, certify the record and proceedings aforesaid, together with all things touching the same, to us, in our present parliament; that we, inspecting the record and proceedings aforesaid, with the consent of the lords spiritual and temporal, in parliament assembled, for correcting those errors, may further cause to be done, what of right, and according to the law and customs of this our kingdom of *England*, ought to be done. Witness ourself at *Westminster*, on the twenty-sixth

day of *January*, in the ninth year of our reign.

S. Terry.

The answer of sir *John Holt* knight, the chief justice within named.

The record and proceedings of the plaint, whereof mention is within made, with all things touching the same, to the lord the king within named in the present parliament, with my proper hands I have produced, in a certain record to this writ annexed, as I am within commanded.

J. Holt.

Pleas before our sovereign lord the king, at Westminster, of Michaelmas term in the eighth year of the reign of our sovereign lord William the third, now king of England, &c. Roll. 347.

Judgment in
the King's
Bench.

AT which day the said parties come before our sovereign lord the king at *Westminster*, by their said attornies, and all and singular the premises being viewed and fully understood by the court of our said sovereign lord the king now here, and upon diligent examination and inspection, as well of the record and proceedings afore-
said,

saïd, and the judgment given thereupon, as also of the saïd causes and matters by the saïd *Richard Coote* assigned for error, in as much as it appears to our saïd sovereign lord the king, that neither in the record and proceedings aforesaid, nor in giving the judgment aforesaid, is there any error whatsoever, and that the record is in no wise vitious or defective; it is adjudged, that the saïd judgment be in all respects affirmed, and remain in its full force and effect, the saïd causes and matters assigned for error in any wise notwithstanding: and it is further adjudged by the court of our saïd sovereign lord the king, that the saïd *John Lynch* do recover against the saïd *Richard Coote*, forty-four pounds, now here adjudged in the saïd court of our saïd sovereign lord the king, (according to the form of the statute in such case made and provided,) to the saïd *John Lynch*, for his expences costs and damages, which he hath sustained by reason of delaying the execution of his judgment aforesaid, by means of prosecuting the saïd writ of error; and that the saïd *Lynch* have his execution thereupon, &c.

Afterwards, that is to say, on the fourth day of *February*, in the tenth year of the reign of *William* the third, now king of

Assignment
of error in
Parliament.

England, &c. the said *Richard Caste*, by *John Lilly* his attorney, comes and pleads, that in the record and proceedings aforesaid, and also in giving judgment as aforesaid, and in the several affirmances of the judgment aforesaid, mentioned in the said record, there is manifest error in this respect, that is to say, it doth appear by the said record, that the judgment aforesaid, given by the said court of our said sovereign lord the king before our said sovereign lord the king, at the king's court in the kingdom of *Ireland*, and in all things affirmed in the court of our said sovereign lord the king before the king himself, whereas no such affirmance of the judgment aforesaid ought to have been given; therefore it is in this respect manifestly erroneous; and he prays that the judgment aforesaid, for that and other errors in the record and proceedings aforesaid, be reversed; annulled and rendered altogether ineffectual; and that he be restored to all things which he hath been deprived of, by means of the judgments aforesaid; and that the said *John Lynch* rejoin to the errors aforesaid.

Edward Northy.

And the said *John* saith, that neither in the record and proceedings aforesaid,

nor

not in giving judgment as aforesaid, is there any error whatsoever; and he also prays, that this high court of parliament may now here proceed to an examination, as well of the record and proceedings aforesaid, as of the premises above assigned and alledged for error by the said *Richard Cote*; and that the said judgment be in all things affirmed.

Cartham

The said *John Underhill*, on the first day of

Declaration by original for the mesne

Profits.

Worcestershire, *John Underhill*, late of

Willesley in the county

of *Gloucester*, yeoman, was attached to an-

swer *John Underhill*, of a plea wherefore

with force and arms, he broke and entered

three messuages, five hundred acres of land,

two hundred acres of meadows, and two

hundred acres of pasture, with the appur-

tenances, in *Tredington* in the county of

Worcester aforesaid, and expelled, put out,

and removed, the said *John Underhill*, from

the possession and occupation of his said

tenements, and kept and continued the said

John Underhill so expelled, put out, and re-

moved, from the possession and occupation

of the same, for a long space of time;

and during all that time, had and received, to his own use, all the rents issues and profits of the said tenements, being of the yearly value of two hundred pounds; and other injuries to the said *John Underbill* there did, to the great damage of the said *John Underbill*, and against the peace of our sovereign lord the king, his crown and dignity: and hereupon the said *John Underbill*, by *Giles Taylor* his attorney, complains that the said *John Durban*, on the first day of *June*, in the fifth year of the reign of his present majesty, with force and arms, broke and entered the said three messuages, five hundred acres of land, two hundred acres of meadow, and two hundred acres of pasture, with the appurtenances, in *Tredington* aforesaid, in the said county of *Worcester*, and expelled, put out, and removed, the said *John Underbill* from the possession and occupation of his said tenements, and kept and continued the said *John Underbill* so expelled, put out, and removed, from the possession and occupation of the same, for a long space of time; that is to say, from the said first day of *June* in the tenth year aforesaid, until the day of suing out the original writ of the aid *John Underbill*; and, during all that time, had and received, to his own use, all the

the rents, issues, and profits, of the said tenements, being of the yearly value of two hundred pounds; and other injuries to the said *John Underbill* then and there did, to the great damage of the said *John Underbill*, and against the peace of our said sovereign lord the king, his crown and dignity: wherefore the said *John Underbill* says that he is injured, and hath sustained damage to the value of fifty pounds, and therefore he brings his suit, &c.

Declaration, by bill, for the mesne profits, and costs in ejectment, after judgment by default against the casual ejector.

Middlesex ss. **J**AMES *Tborne* complains of *William Goodhall* being in the custody of the marshal of the *Marsalsea*, of our sovereign lord the king, before the king himself, for that the said *William* on the twenty-sixth day of *March*, in the eleventh year of the reign of his present majesty [the day on which the ejectment was laid] with force and arms, broke and entered one shop, one parlour, and one cellar, part and parcel of a certain messuage or dwelling house, with the appurtenances,

purtenances, of him the said *James*, in the
 parish of, &c. in the said county of *Middle-*
sex, and then and there expelled, put out,
 and removed, the said *James* from the pos-
 session and occupation thereof; and kept
 and continued the said *James*, so expelled,
 put out, and removed, from the possession
 and occupation thereof, for a long space of
 time, to wit, from thence for the space
 of nine months then next following; and,
 during all that time, had and received, to
 his own use, all the rents, issues, and pro-
 fits of the said several premises, being of a
 large yearly value, to wit, of the yearly
 value of sixteen pounds: by reason whereof
 the said *James* was forced and obliged to
 lay out and expend, and did lay out and
 expend, a large sum of money, to wit, the
 sum of twenty pounds, in and about re-
 covering possession of his said shop, par-
 lour, and cellar, with the appurtenances, to
 wit, at the parish aforesaid; and the said
William then and there did other wrongs to
 the said *James*, against the peace of our said
 sovereign lord the king, and to the said
James his damage of forty pounds; and
 therefore he brings his suit, &c.

Pledges to prosecute, } *John Doe,*
 } *Richard Roe.*

Pleas

*Pleas thereto; viz. 1. Not guilty and
2. Not guilty within four years.*

AND the said *William*, by *John Brown* his attorney, comes and defends the force and injury when, &c. and says, that he is not guilty of the trespass, above laid to his charge, in manner and form as the said *James* hath above thereof complained against him; and of this he puts himself upon the country, and the said *William* doth the like. And for a further plea in this behalf, the said *William*, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *James* ought not to have his aforesaid action thereof against him: because he says, that he was not guilty of the trespass aforesaid, above laid to his charge, at any time within four years, next before the day of exhibiting the bill of the said *James* against the said *William*, in the manner and form as the said *James* hath above thereof complained against him the said *William*: and this he the said *William* is ready to verify, wherefore he prays judgment if the said *James* ought to have his aforesaid action thereof against him, &c.

C. Runnington.
Repli-

Replication to the last plea, and issue.

AND the said *James*, as to the said plea of the said *William*, by him lastly above pleaded in bar, says, that he, by reason of any thing by the said *William*, in that plea alledged, ought not to be barred from having his aforesaid action thereof against him; because he saith, that the said *William* was guilty of the trespass aforesaid, above laid to his charge, within four years next before the day of exhibiting the bill of the said *James* against the said *William*, in manner and form as he the said *James* hath thereof complained against him the said *William*: and this he the said *James* prays may be enquired of by the country; and the said *William* doth the like, &c.

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